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HARVARD RY

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD NEW-YORK REPORTS ISSUED DURING THE PERIOD EMBRACED IN THIS VOLUME.

BY

BENJAMIN VAUGHAN ABBOTT,

AND

AUSTIN ABBOTT,

COUNSELLORS AT LAW.

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ABBOTTS'

PRACTICE REPORTS.

NEW-YORK.

NEW SERIES.

LEA *against* THE AMERICAN ATLANTIC AND PACIFIC CANAL COMPANY.

Supreme Court, First District; Chambers, June, 1867.

ENTRY OF JUDGMENT.—CHANGE OF CORPORATE NAME.

It seems, that our courts will not presume that the executive authority of a foreign government has power, without some legislative or judicial sanction or approval, to annul or dissolve a corporation.

A decree by which an act of incorporation is annulled and the corporation dissolved, "*except* for certain purposes;" and which declares that the corporation shall only continue in existence for purposes specified, and that persons shall be appointed as receivers to take its assets and carry on its business, does not operate to extinguish the existence of the corporation, in any such sense that it cannot be revived by repeal of the decree or by other governmental act recognizing the corporation as existent.

The rules of the common law relative to the dissolution of corporations, and the distinction between the discolution of a corporation and the suspension of its franchises, and between an original charter and the charter of revival,—considered.

Where, by a decree, such as above described, a corporation was dissolved, and a subsequent decree of government contained a complete recognition of

the corporation as still existing, and by a new name,—*Held* that the latter decree should be considered as reviving the corporation, under its old charter, and subject, though under a new name, to its debts and liabilities incurred under the old name.

Even if the second decree should be called a new charter, it ought not to be regarded as creating a new corporation, but as reviving and confirming and somewhat modifying the old one; at least as to foreign creditors of the old one.

Motion for leave to enter judgment against the defendants, in an action commenced against the American Atlantic and Pacific Ship Canal Company, by the name of the Central American Transit Company.

The action was commenced in March, 1860, to recover for services alleged to have been performed by the plaintiff, Isaac C. Lea, for the defendants, The American Atlantic and Pacific Ship Canal Company. The plaintiff averred that the defendants were a corporation, and set out the cause of action for services. The defendants answered, the answer being sworn to by their secretary, denied the averments in the complaint, and set up a counter-claim. On the trial of the issue, judgment was ordered for the plaintiffs, for $5,976 91. The plaintiff now moved for leave to enter this judgment against the defendants, by the name of the Central American Transit Company, upon the ground that, during the progress of the suit, the defendants' corporate name had been changed.

It appeared, by papers read upon the motion, that the defendants were incorporated by the State of Nicaragua, on March 9th, 1850. In February, 1856, "the then provisional president" of Nicaragua made an executive decree, the substance of which is stated in the opinion of the Court, and which was relied upon by the defendants, as operating to dissolve the corporation. It further appeared that, in 1861, a decree of the government of Nicaragua was promulgated, under authority of which the defendants were invited to carry on business, but which they relied on as in the light of an original charter, giving them a corporate existence independent of the engagements or obligations incurred under a prior organization.

E. W. Stoughton, in support of motion. I. The motion is clearly within the power of the court, not only by virtue of powers which inhere in every court, but by the provisions of the Code and a long course of judicial practice. To deny the power, in a proper case, would involve the expense of a new trial for every new name the defendants, in a cause, whether corporations or natural persons—should assume during a protracted litigation. The motion is, moreover, eminently proper in this case. The plaintiff, it is true, could have entered judgment and issued execution against the defendants by their old name, under which their property in the city of New York, where they have ample means, could have been seized; but this course would be resisted, and the resistance would have raised the same questions which are presented on this motion.

II. With two memorable exceptions, long since, the imperial powers of Parliament were never called into action for the purpose of dissolving corporations or forfeiting corporate property (*Ang. & A. on Corp.*, § 767); and it is well settled that no power of dissolution or forfeiture resides in the Crown, although it may grant the franchise sought to be forfeited or withdrawn (*See* 5 *Johns. Chan.*, 378). These considerations show, not only that the Provisional President of Nicaragua had not the power to make the decree relied upon as dissolving the corporation; but also, that, even assuming that he had such power, a court will not construe his act so as to work the outrage upon private rights and corporate property, which would be involved, without unmistakable evidence that such was his purpose, nor without finding in the decree apt and decisive language effectuating it. If it is possible for the court to construe the decree so as to leave the corporation its franchise, property, and the rights of its creditors undestroyed, such construction will be applied.

III. On examining the decree relied upon, in the light of these principles, it appears not to work the dissolution contended for. 1. There is no evidence that the Provisional President of Nicaragua was vested with any power to decree such dissolution. 2. The decree does not, in terms, purport

to dissolve the corporation, but expressly declares that the corporation *shall continue to exist* for certain purposes mentioned.

IV. Not only did the decree fail by its language or operation to dissolve the corporation, but all the disabilities and forfeitures sought to be created by it were expressly waived by the supreme power of the State, by subsequent acts, decrees and contracts. That the State had power to do this in favor of a corporation not actually, and finally dissolved, will not be denied. 1. Look at the decree and contract made June 19, 1857. This arrangement was made, not by a Provisional President, but by the imperial power of the State. Two of its articles are expressly devoted to changes and amendments of the agreement between the contracting parties, made in 1849, and framed and ratified by them in 1850. The State, by entering into the contract of 1857, affirmed in the most solemn manner the propositions that the American Atlantic and Pacific Ship Canal Company then existed as a corporation, and that both it and the State were bound by the terms of the contract of 1850; thus showing a waiver by the State of all claims of forfeiture under the decree of February, 1866. 2. The decree and contract of October 26, 1857, is still more decisive of a complete waiver of the State decree of February, 1856. By examining its terms, it will be seen that it could only have been made upon the assumption that the corporation was in full possession of all the powers and rights which the State had previously conferred.

V. A still later decree, authorized by the Congress of the State, changed the name of the company to the Central American Transit Company, increased its capital stock, and made changes in the contracts theretofore existing between the State and the defendants. That the corporation contemplated by the new name, was substantially the same with the defendants' corporation, is shown by the facts that the stock of the company previously issued to its corporators still continued to be recognized as part of its capital under its new name, without any further payments; that the new arrangement was ratified by the defendants acting as a corporation, and not as unincor-

porated associates; and that the State and defendants reciprocally released each other from all claims for damages under previous engagements.

VI. It is confidently submitted that the court, in disposing of this motion, should rely upon the many and controlling facts above referred to as showing the continued existence of the defendants as a corporation from 1850 to the present time; and that to permit them to escape from responsibility and withdraw their property from their creditors, under cover of a new name, would be to violate established principles and perpetrate a great injustice upon creditors.

B. F. Randolph, opposed. I. The entry of judgment cannot be against the Central American Transit Company, if the name of the defendant had been changed by an act of the government of Nicaragua. 1. The cause has been tried, the order for judgment filed, costs taxed, and the action has proceeded to the verge of the entry of final judgment; the motion for which is formal and the entry directed by the Code. 2. The plaintiff cannot amend, because amendments can only be made to conform the pleadings to the facts proved, and in this case on the trial there was not (there could not be under the issue) proof that the name of the defendants was the Central American Transit Company. Nor can there be an amendment after the trial which changes the nature of the defence. (*Code*, § 173.) 3. A trial, and verdict or decision of the court, will not aid the defect in the plaintiff's proceedings, as nothing will be presumed proved but what is expressly stated in the complaint or necessarily implied, and what the issue required should be proved. The complaint sets forth, and the issue involved, a claim against the defendants by the name of the American Atlantic and Pacific Ship Canal Company, and only proof of the existence of the company by that name could be produced on the trial. (1 *Tidd's Pr.*, 450; 2 *Id.*, 919; Pangburn *v.* Ramsey, 11 *Johns.*, 141.) 4. It would be a dangerous experiment to permit after trial and decision, the entry of judgment, on supplementary proof, against the company by a different name from that which the proof on the trial established. Proceedings in actions should be so conducted that

there shall be no probability of a recovery of judgment against a party not liable for the cause of action. It is not safe to permit the entry of a judgment against a defendant by a name different from the name proved on the trial and contained in the decision in writing.

II. If the motion can be entertained, the proof submitted by the plaintiff establishes that the American Atlantic and Pacific Ship Canal Company had been dissolved and did not exist as a corporation in 1861, and therefore the Central American Transit Company which then received its name, and as we say was created, is not the same corporation. The dissolution of the corporation known as the American Atlantic and Pacific Ship Canal Company precludes the possibility of the plaintiff's success.

III. It is suggested that the repeal of the grants to the associates, and the act incorporating the American Atlantic and Pacific Ship Canal Company, was by the Provisional government, which had not power to repeal it, and therefore the act is void. That government was, however, the supreme power of Nicaragua, recognized as such by the United States government. As such it had power to repeal the grant and the act of incorporation. The act of incorporation was the act of the supreme director—the person exercising the supreme power—and it could consequently be afterwards repealed by the supreme power subsequently vested in another person. In any State the supreme or law-making power can repeal an act incorporating a company. This is the prerogative of the government. Policy may have prevented the exercise of the power in Great Britain, but Parliament has the power and has exercised it. Under the Constitution of the United States the State governments cannot repeal certain charters, but this restriction is peculiar to our government, and the adoption of it in the constitution is an acknowledgement that without such restriction the power exists. Especially is this true of corporations which exist for public purposes, as distinguished from private business corporations. The government has full power to control a corporation of the former class, to create a corporation and confer a charter, or to revoke such charter and dissolve the corporation.

IV. It is suggested that the act of 1856 did not dissolve the corporation, because the decree of dissolution makes provision for the preservation of the debt due Nicaragua. It is clear, however, that the government of Nicaragua intended to repeal the act of incorporation, and by the act of February, 1856, expressly annulled it. The effect of the repeal of the charter was the dissolution of the corporation. To complete this, the corporation was declared dissolved, and to preserve the debt due to the government, a commission was appointed to seize the property and ascertain the amount due. This provision is no part of that portion of the act which repeals the charter. It is only for the purpose of enabling the commissioners to make the necessary examination, and to preserve and secure the debt due to the government, that the company is to be considered in existence. The government expressly enacts that the corporation is dissolved. The existence for the special purpose stated, is consistent with the decree of dissolution, and does not affect the operation of that part of the act which repeals the charter. A corporation is dissolved and has expired on the repeal of its charter, notwithstanding such a probation; which is nothing more than a mode of preserving the debt due to the government. (Cresse *v.* Babcock, 23 *Peck*, 346; *Angell & A. on Corp.*, § 195; Reed *v.* Frankfort Bank, 23 *Me.*, 318; Whitman *v.* Cox, 26 *Id.*, 335; Commercial B. of Natchez *v.* Chambers, 8 *Smed. & M.*, 9.) A judgment of seizure against a corporation operates to dissolve the corporation. (King *v.* Avery, 2 *T. R.*, 515.) On repeal of the charter, or dissolution, the corporation ceases to exist. (Whitman *v.* Cox, 26 *Me.*, 335; Green *v.* Seymour, 3 *Sand. Ch.*, 286; White *v.* Campbell, 5 *Humph.*, 238.) In this case there was a repeal of the charter, a declared dissolution of the corporation by a decree of the government, a probation to close its affairs with the government, the appointment of a commission or receivers, and a decree of seizure of the property, which by itself is sufficient proof of the intent to dissolve the corporation; all together forming the strongest cumulative evidence of such intent.

V. It is alleged on the part of the plaintiff that the reference in the subsequent decrees to the American Atlantic and Pacific Ship Canal Company acknowledged that they were still a cor-

poration. But the words *company* and *corporation*, though sometimes synonymous, are not so always. If the corporation was dissolved in 1856, the subsequent allusion in later grants to the American Atlantic and Pacific Ship Canal Company can only signify that they were an unincorporated company, not that they were an incorporated one. The contracts, properly construed, show that subsequent to 1856 the corporation did not exist; but that an unincorporated company did exist with whom the government contracted. It is perfectly clear that the Government regarded the corporation as annulled, extinguished; and was dealing with the associates as an unincorporated company.

VI. It is alleged on the part of the plaintiff that the act of March 20, 1861, by which the holders of shares in the unincorporated company, known as the American Atlantic and Pacific Ship Canal Company, and incorporated as a body politic by the name of the Central American Transit Company, was somehow an admission that the associates were an incorporation. But this could not be so, because: 1. If they were already a corporation they would not apply to be incorporated. 2. They would not be again incorporated. 3. A corporation dissolved cannot be recognized as in existence. (White *v.* Campbell, 5 *Humph.*, 38). 4. The act of 1861 is consistent throughout with the fact that the associates were not an incorporated company, and did not possess the rights and privileges of one.

VII. It is alleged by the plaintiff that the act of 1861 operated as a change of the corporate name of the American Atlantic and Pacific Ship Canal Company which then existed, and had continued to exist as the same corporation with that created March 9, 1850. But the act of 1861 does not purport to be a revivor or continuance of a former corporation; nor does it purport to be a repeal of the decree of February, 1856; and if it did repeal that act the effect would be not to revive the old corporation, but the new corporation would be created. Where a new charter is given, or a corporation of the same name, composed of the same stockholders as an existing corporation, and the corporation thus existing does business in the same place, has the same objects of incorporation, and

continues the business and pays the debts of the old company, their identity is not established. (*Angell & Ames on Corp.*, § 780; Bellows *v.* Hallowell Bank, 2 *Mason*, 31; Pres't of Port Gibson *v.* Moore, 13 *Smed. & M.*, 158.) Moreover, the terms of the charter of 1861 show an intention to create a new corporation rather than to recognize an old one. From all its provisions, it is evident that the government of Nicaragua intended the Central American Transit Company to be a new corporation, and treated with the associates as persons in it having corporate rights; and also that the corporators of the Central American Transit Company intended to be a new corporation. Nowhere in their charter of 1861 do they claim to have corporate rights already; and it is perfectly evident that they did not intend to assume the debts of the corporation that was dissolved in 1856. A new corporation is not liable for the debts of the former corporation, because being dissolved, its debts are extinguished. (*Angell & Ames on Corp.*, §§ 195–779; Commercial B. *v.* Lockwood, 2 *Harring.*, 8.) Nor is a corporation liable for the debts of the associates or persons who formed the incorporated company prior to the creation of the corporation unless such debts are assumed by the latter. (Dingledein *v.* Third Ave. R. R. Co., 9 *Bosw.*, 79; Wyman *v.* American Powder Co., 8 *Cush.*, 181.)

VIII. The fact that the American Atlantic and Pacific Ship Canal Company were sued by the plaintiff and appeared in that suit as a corporation—if they did so appear—does not affect the Central American Transit Company. At that time the Central American Transit Company was not in existence. The action was not in the courts of the government of Nicaragua. If in that suit it has been adjudged that the defendant was a corporation, it was on a trial in which the Central American Transit Company was not heard and in which the evidence of the repeal of the act of incorporation of 1856 was not produced. To grant the present motion would be unjust towards the Central American Transit Company, for the reason that that company never received any property from the American Atlantic and Pacific Ship Canal Company, nor any right or privilege or business; and the plaintiff never performed services for the new corporation. To grant the motion is in

effect rendering judgment against the new company without a trial.

SUTHERLAND, *J.*—It seems that the original grant to Vanderbilt, White, Wolfe, and their associates, of Sept. 22, 1849, and the modifications of that grant, of the 9th of March, 1850, were both ratified by the Legislature of Nicaragua.

The act or charter of these associates, of the 9th of March, 1850, as a corporation, by the name of "The American Atlantic and Pacific Ship Canal Company" was by the "supreme director," only; without—from aught that appears—the authority or sanction of the Legislature.

Were it a question in this case, whether the "supreme director" had power thus to create a corporation, I should have to infer such power, solely from the fact that he undertook to claim and exercise the power, and from the subsequent acts of the authorities of Nicaragua and of their associates.

Though it be conceded that the "supreme director" had power to create the corporation, it does not follow that the provisional president of the Republic of Nicaragua had power to annul or dissolve it by the decree of the 18th of February, 1856.

At common law, the king could create a corporation, but could not arbitrarily, and without a judicial proceeding, dissolve or destroy any corporation. Parliament, being theoretically omnipotent, could do so; but there are probably only two or three instances of the power having ever been exercised.

I must say, from the papers submitted on this motion, the presumption is that the "provisional president of the Republic of Nicaragua" had not power by the decree, or otherwise, arbitrarily, and without any legislative or judicial sanction or proceeding, to annul or dissolve the corporation.

But if he had, the decree did not completely annul or dissolve the corporation. By the first article of the decree, the act of incorporation is annulled and the corporation dissolved and abolished, *except* for certain purposes mentioned in the subsequent articles.

By the second article, certain individuals are named as com-

missioners to liquidate and secure the sum due from the corporation to Nicaragua.

The fourth article substantially declares that the corporation shall only be continued in existence for the purpose of ascertaining how much is due to Nicaragua, and for the purpose of collecting it.

By the fifth article, the commission, after ascertaining the amount due to Nicaragua, are commanded to seize all the property of the corporation in Nicaragua, and to deposit it in the hands of respectable or responsible persons (receivers).

The sixth article, substantially declares that, for the public convenience, these respectable persons, or receivers, on giving security for the return of the property to the commissioners, shall take it and carry on the business of the corporation, at least as to the transit of passengers by the way of the Isthmus; and this section expressly declares, that the persons or receivers so taking the property, shall be obliged to transport passengers who may arrive on the Atlantic and on the Pacific, and the expense of such transportation of passengers shall be charged to the corporation.

The appointment of a receiver of *all* the property of a corporation does not annul its charter, nor can the seizure of all the property of a corporation dissolve it. Its charter, all its franchises, including its charter to the franchise to be a corporation, must be seized, or declared forfeited or annulled by some legal proceeding. The proceeding, by *scire facias*, to repeal the charter, appears to have been the only adverse legal proceeding at common law by which a chartered corporation could be so completely and finally annulled and annihilated; but it could not afterwards, at any time, be restored or revived with its old powers or suspended rights, and subject it to its old or suspended liabilities—(See *Grant on Corporations*, 295, 296, 300, 301, *marg. pag.*)

It seems that a judgment of seizure, in a *quo warranto* information or proceeding against the franchises of a corporation, either by charter or proscription, did not operate to dissolve the corporation, but only to suspend its regular operation during the pleasure of the crown, and that notwithstanding such judgment of seizure, the corporation could be *revived* by a new

charter, which would operate by rotation, so as to make the new body in all respects identical with the old, as regards debts, liabilities, &c.; and this though the name and the constitution of the body politic, were altered by the new charter. It also seems that the usual practice upon such seizure, was for the crown to appoint a *custos*, who appears to have discharged all the functions, duties, &c., of the corporation until the restitution of the franchise or the revival of the corporation. (*Grant on Corp.*, 300 to 303.) That such revival was only a continuation of the old corporation, and that the revived corporation was obliged to take the act or charter of revival with all the debts, liabilities and rights of action of the old one, though there might be additional powers and regulations contained in the charter of revival. (See *Grant on Corp.*, 304; *R. v. Pasmore*, 3 *T. R.*, 247; Mayor, &c., of Colchester *v.* Seeber, 3 *Burr*, 1866; Mayor of Colchester *v.* Brooks, 7 *Q. B.*, 53 *Com. Law Rep.* 383; Duttrell's Case, 4 *Rep.*, 87*b.*; King *v.* Knight, 4 *Y. B.*, 245; Haddock's Case, 4 *Ventr.*, 355; *S. C.*, *T. Raymond*, 435.)

That a new name makes no difference, see also *Bull, N. P.*, 213. As to the effect of a merger by act of the Legislature of the rights of an old corporation in a new one, and as to how far it is a dissolution of the old one, see Union Canal Co. *v.* Young, and others, 1 *Wharton R.*, 410; Bellows *v.* Hallowell & Augusta Bank, 2 *Mason C. C. R.*, 31; State Bank of Indiana *v.* State, 1 *Black (Ind.) R.*, 273.

As to the effect of a corporation dissolving and reorganizing itself, as it regards debts owing by the corporation, see Longley *v.* The Longley Stage Co., 30 *Maine (17 Shep.) R.*, 448; Bank of the United States *v.* The Commonwealth, 17 *Penn. R.* (5 *Harris*), 400.

Any one who will take the trouble to look carefully into the common law cases above cited, will see that the distinction between the absolute and complete dissolution of a corporation and the *suspension* of its corporate rights and operations, and between the effects of the grant and acceptance of a charter of *revival* and of a charter creating a new and original corporation, was taken and established from the most equitable consideration, and to prevent injustice resulting to third parties

from the common law effects of a complete dissolution of a corporation and its abstract nature, viewed in one aspect. The common law principles established or illustrated by these cases, throw great light not only upon the construction and effect to be given to the decree of the provisional president of the Republic of Nicaragua, on the 18th of February, 1856, but also upon the construction and effect to be given to the subsequent acts and dealings by and between the Nicaraguan authorities and the American Atlantic and Pacific Ship Canal Company, especially the new charter (if it can be called a charter) of that company, of March 20, 1861, by the name of the Central American Transit Company, and its acceptance.

Notwithstanding the words of the first article of the decree of February, 1856, in view of the subsequent article of that decree, of the subsequent acts and dealings by and between the Nicaraguan authorities and the company, particularly the new charter or instrument of March 28, 1861, and in view of the common law principles and authorities above referred to, I am clearly of the opinion that the decree did not operate and was not intended to operate, *even as between the corporation and Nicaragua*, as a complete dissolution, or annihilation, of the corporation, presently or eventually. In my opinion this decree operated and was intended to operate, even as between the corporation and Nicaragua, not as extinguishment of the corporation, but only as a suspension of the corporate rights and operations *by way of punishment*, and for the purpose of securing what Nicaragua claimed as her due. Not only does the fourth article provide for the continuing existence of the corporation, for certain purposes, for an indefinite time, but the sixth article also provides for the continuing of the most important business or purpose of the corporation, through the custodians or receivers of the property, to be seized for an indefinite period.

Probably, in this case, if I am to assume that there was any law in Nicaragua, I must assume it was the common law; and by the common law, on the complete dissolution of a corporation, its real estate went to the parties from whom it came, or their heirs, and its personal estate seems to have vested in the crown, as *bona vacantia*. If, then, the common law prevailed

in Nicaragua, and the decree operated as a complete dissolution of the corporation, the provisional President had no right to seize the real estate of the corporation for the debt or dues; and as to the personal, the provision by the fifth and sixth articles of the decree, providing for its seizure for *the debt or dues*, would seem to be inconsistent with an intended complete dissolution; for the fact of such complete dissolution alone would have vested it in Nicaragua or its authorities.

As to the continuation of the corporation by the fourth article for certain purposes only, it has been said (Guardians Woodbridge Union *v.* Guardian Colonies Union, 18 *Law J., N. S., Q. B.*, 133, 134) that a corporation may be dissolved for some purposes and not for others, but such a proposition or principle is not free from difficulties, and requires for my assent more examination than I can now make.

I am of the opinion, then, that the decree of February 18th, 1856, did not work a complete dissolution of the corporation, but that the decree left the corporation in such position or condition that it could be restored or revived with all its old rights and liabilities, as if the decree had never been made, by any competent act of the government or authorities of Nicaragua, waiving the decree, or by a new charter, and without referring particularly to the grant, or contract, of June 19, 1837, called the "Stebbins' Company Grant," or the modification of that grant by the decree of October 26, 1857, or the act or decree of March 24, 1859, repeating the Stebbins' grant, so called—all of which appear to me be, to say the least, more or less inconsistent with the idea that the Nicaraguan government, or authorities, considered the corporation completely dissolved. I am of the opinion that the charter, contract or decree of March 20, 1861, was a complete recognition of the then existence of the corporation by the old name, under the old charter, and should be regarded as reviving, settling and confirming—with certain modifications of its constitutional articles, by way of compromise—its franchises, rights and privileges under its old charter and under the grants, contracts and dealings by and between Nicaragua and the company, previous to such act or instrument of confirmation and compromise.

This act or instrument did not disturb or undertake to dis-

turb or affect the rights of property or of action, or indeed any rights or remedies of the company, as between the company and third parties; and there cannot be a doubt, I think, that it left the corporation, as between it and third parties, subject, in or by the new name, to its debts and liabilities contracted or incurred by or in the old name. As to third parties, creditors of the corporation by the old name, I am clearly of the opinion that the corporation by the new name and the corporation by the old name should be regarded as substantially—perhaps I should say as identically—the same corporation.

If the charter, contract or decree of March, 1861, can properly be called a *new* charter, it should not be regarded as *creating* a *new* corporation, but as reviving and confirming and somewhat modifying an old one—certainly as to third parties, and more especially as to foreign creditors of the old one by the old name. And if it is proper to say that the property and franchises of the corporation, by the old name, were by the new charter merged in or transferred to the corporation by the new name, certainly such merger or transfer was subject to all its debts and liabilities to third parties by or in the old name.

To show the correctness of these views as to the operation of the charter or instrument of 1861, I refer particularly to the first article, which declares that the *shareholders* in the American Atlantic and Pacific Ship Canal Company shall be *recognized* as a corporation (not that they shall *be* a corporation) under the name "Central American Transit Company." And to the second article, which declares that all the shares which had been issued in the name of the former company should be *included* in the capital of three millions, of the corporation, by the new name, thus transferring to or leaving in the corporation by the new name, all the property of the corporation by the old name, which must be supposed to have been represented by the shares thus included in the corporation by the new name. And I refer also to the twenty-first article, which forcibly shows that the parties considered the charter or instrument of 1861 as a compromise, and that the Nicaraguan authorities recognized at least the claim of right by the company under the previous charter and contracts, and with other rights, the right to be a corporation. Moreover, I question whether the

"Central American Transit Company," as to the plaintiffs, ought to be permitted to set up that it was not a corporation by the old name, when the charter or instrument of 1861 was accepted, or that it is not the same corporation as the old one, by a different name. Whatever may have been the operation of the decree of 1856, the *company* did not admit that it annulled its charter. Notwithstanding the decree, it claimed to be a corporation and kept organized as a corporation, and the plaintiff performed services for it as a corporation, to recover pay for which this suit was brought against it by the name of the "American Atlantic and Pacific Ship Canal Company." As a corporation, before the charter or instrument of 1861 was made and accepted, the defendant put in an answer as a corporation, by the old name, which answer was verified by one of its officers, and as the answer of a corporation. The Central American Transit Company, by the charter or instrument of 1861, succeeded to or was permitted to retain and did retain all the rights and property of the American Atlantic and Pacific Ship Canal Company, except that as between Nicaragua and the company, certain rights or franchises were somewhat modified or changed; but the main corporate purpose of the corporation under the old name and under the new was and is the same.

It may be that this motion was not necessary, but I think, under the circumstances it was prudent and should be granted, but without costs to either party.

AMORY *against* AMORY.

New York Superior Court; Special Term, November, 1866.

DIVORCE—NEW TRIAL.

The provision of *Rev. Stat.*, 145, § 40—that in actions for divorce on the ground of adultery, the court may, if the offence charged is denied, award a new or

further trial as often as justice shall seem to require, was intended to award a new trial of the issue upon the charge of adultery; and does not relate to the trial of any other issue.

The statute does not authorize a new trial to be granted to a plaintiff, whose action was dismissed upon the first trial for her failure to prove her marriage with the defendant.

The power conferred by § 174 of the Code of Procedure upon the courts, to relieve a party from a proceeding taken against him through mistake, &c., cannot be exercised after the expiration of the year limited in that section from a notice of the proceeding.

Motion to open or set aside a judgment, and for a new trial.

This action was commenced in July, 1857, by Angelina Amory against James Amory, to procure a divorce upon the ground of the alleged adultery of the defendant.

The defendant, by his answer, after denying the marriage, alleged, as a separate defence, that, at the time of the supposed marriage, the plaintiff was the lawful wife of one William A. Williams, who was then living.

The issues were sent to a referee for trial, who found as facts: First, That the plaintiff and defendant were never married; and, second, That at the time of the alleged marriage, the plaintiff was the lawful wife of William A. Williams, who was then living.

Upon the report of the referee, it was adjudged by this court, that the plaintiff and defendant were never married, and also that the plaintiff was incapable of contracting a lawful marriage with the defendant, by reason of her former marriage with Williams; and was, therefore, not entitled to the relief she demanded. Such judgment was entered on the 2d October, 1860. Prior thereto, however, a motion was made on behalf of the plaintiff to open the case for further proof of the marriage with the defendant, which, after full consideration, was denied.

The plaintiff now moved that the judgment be opened or set aside, and that a new trial be granted.

It was now alleged, in support of this motion, that in 1851, in a suit for the partition of lands, the defendant and plaintiff were parties; that the plaintiff was therein alleged to be the wife of the defendant, and to be entitled to an inchoate right of dower in her husband's share, and that the decree in such

suit provided for the payment to the plaintiff of a sum in gross, in satisfaction of said right of dower, upon her releasing the same to her husband. And it was insisted that such recognition and admission in that suit, of the plaintiff, as the wife of the defendant, and the adjudication thereon establishing the marital relations of the parties, were an estoppel on the defendant to deny the marriage; and that, with such proof before the referee, he could not have found the parties were not married.

S. Sanxay, in support of the motion.

W. Fullerton, opposed.

MONELL, J.—It is provided by statute that in actions for divorce on the ground of adultery, the court may, if the offence charged is denied, award a new or further trial of such issues, as often as justice shall seem to require (2 *R. S.*, 145, § 40). And it is claimed, on behalf of the plaintiff, that she is entitled to the relief she demands under such provision. I have not been able to find any judicial construction of that statute, but I am of opinion that it has no application to this case. The section was evidently intended to give the court power to award a new or further trial, after a trial of the issue made by the pleadings, of the adultery charged. It provides that if the offence is denied, the court shall direct an issue to be made, for the trial of the facts contested by the pleadings, by a jury, and may award a new trial, &c. The section does not relate to the trial of any other issues. Indeed the whole article where the section is to be found, relates solely to divorces on the ground of adultery. A party against whom such issue has been found by a jury, may have a second trial, if justice shall seem to require it. It cannot be that a plaintiff, who charges adultery by the defendant, and is defeated in his action, can claim a new trial under the statutes referred to. In the case before me, the plaintiff's suit was dismissed upon her failure to prove a marriage, and, upon the further ground, that she was incapable of contracting a marriage. The issue of the defendant's adultery was not tried, it being unnecessary to try it, after the other issues had been found against the plaintiff.

I am satisfied that the plaintiff cannot claim the benefit of

the statute to which I have referred. A defeated party, whose guilt of the offence has been established by the verdict of a jury, can alone avail himself of its provisions.

The Code provides (§ 174) that at any time within one year after notice thereof, the court may relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect. But such provision limits the power to one year after notice, and is conclusive on this motion, as it is not claimed that the defendant had not notice of the judgment she seeks to open, at the time it was entered.

There is, however, another answer to this motion, which goes more to the merits of the application.

The only reason assigned for a new trial, is the evidence of marriage furnished by the partition suit; which it is claimed should conclude the defendant. Admitting that such effect would necessarily have to be given to the evidence suggested, there is still the other fact, which the plaintiff does not propose to controvert, namely, that at the time of her marriage to the defendant, she was a married woman. Such fact of itself rendered a marriage with the defendant wholly void. *Bishop on Divorce, Vol.* I, § 299.

Under any aspect, therefore, even though the court had the power to open the judgment, and this was a case in which such power should be exerted, the plaintiff would be without any substantial relief. Her former marriage stands as a perpetual bar to her claiming to be the wife of the defendant. More than six years have elapsed since a solemn judgment of this court was pronounced against the plaintiff. What new relations the parties, or either of them, have formed, does not appear. But the security and quietude which such judgment has afforded, should not be disturbed, except for most clear and conclusive reasons.

I find nothing in the papers before me which furnishes any such reasons.

The motion must be denied.

ELDRIDGE *against* TROOST.

N. Y. Superior Court; Special Term, November, 1866.

PARTNERSHIP.—GENERAL AND SPECIAL.—APPLICATION OF ASSETS.

A general partnership may exist in respect to a single adventure; or may be made to extend over any number of adventures agreed upon by the parties.

To constitute a general partnership, nothing more is necessary than that the parties should agree to conduct a specified business, and to share its profit and loss. The business may be of a general nature, or may be confined to particular transactions; but in either case the partnership is general.

Where parties agreed to carry on upon joint account the shipment of goods from Calcutta for sale in New York, providing in their agreement for the mode of payment, manner of sale, division of profits and sharing of losses, but prescribing no limit to the duration of the business or to the amount or number of shipments.

Held, 1. That the parties were general partners.

2. That the agreement did not create a new and distinct partnership as to each shipment, so that a liability incurred for one shipment could not attach to another—although it provided that "profit and loss should be settled in New York upon the winding up of each shipment." The terms of the agreement, and the course of business under it, constituted a general partnership between the parties, covering all the shipments made.

3. That in the settlement of the partnership affairs, goods or assets of the firm, appertaining to the joint enterprise, whenever shipped, and whether in the hands of the partners themselves, or of their assignees in trust for creditors, must be applied to the payment of the joint debts.

Trial by the Court.

In January, 1864, Troost, Schmidt & Company, of New York, and Atkinson, Tilton & Company, of Calcutta, entered into an agreement to carry on a business between those cities upon joint account. The parties in New York were to furnish the parties in Calcutta with letters of credit for the shipment of goods at Calcutta to New York, and for advances or assignments. No commissions were to be allowed for the purchase in Calcutta or for the sale in New York. The parties in Calcutta were to purchase and ship such goods and at such times

as they should deem most for the interest of all the parties, under general advices from the parties in New York, who were to sell the same for such prices as they should deem most for the interest of all the parties, and remit to meet the bills drawn against the shipments, at the time of sale, whether before or after such bills became due, and charge the account with the rate of exchange actually paid. The profit and loss was to be equally divided between the parties, "*and settled in New York upon the winding up of each shipment.*" The proceeds of consignments, over the advances and charges were to be remitted to the parties in Calcutta, to be paid to the owners of the goods consigned. If the proceeds were not sufficient to cover the advances and charges, the parties in Calcutta, were to collect the deficiency from the owners; and if any loss should accrue, in not collecting such deficiency, or in remitting to meet the bills, such loss should be borne equally by the parties.

In pursuance of such agreement, Troost, Schmidt & Company furnished the parties in Calcutta with a letter of credit on the firm of Abraham Troost & Company, of Manchester, England.

The general course of business under the agreement was as follows:

The firm in Calcutta on purchasing or advancing on goods at that place, drew bills on the firm in Manchester, and delivered them in payment, or for the advances. They then shipped the goods to the firm in New York, where they were sold and remittances made to the firm in Manchester to meet the bills. Separate bills were drawn for each shipment and advices of such bills forwarded to New York with each consignment. The firm in New York opened and kept a separate account of each shipment, crediting or charging therein all profit or loss upon such shipment, and as far as was practicable, or perhaps possible, closing the same upon their books.

The transactions under the agreement, embracing a large number of shipments, continued until the 4th of December, 1866, when the firm in New York becoming insolvent, made a general assignment of all their property to the defendants Buckley & Mozle, in trust to pay their debts.

The firm in Manchester also went into bankruptcy about the same time (Dec. 3, 1866).

In May, 1866, the Calcutta house shipped to New York, by the "Medura" and "Audubon," 4,750 bags of linseed, and drew upon such shipment two bills, amounting to £3,786 3s., which were accepted by the house in Manchester. One of said bills had been protested for non payment; the other at the time of these proceedings had not matured.

The plaintiffs alleged that they were ignorant of the holders of said bills, but that the plaintiffs were liable thereon, as drawers, for the full amounts thereof.

The goods shipped by the "Medura" and "Audubon," were sold by the house in New York, and the proceeds credited on their books; the two drafts drawn against the shipment and the expenses were charged, and the balance, being the profit, was carried down, and placed to the credit of the shipment.

At the time of the failure of the New York house, they held unsettled various shipments of goods from the house in Calcutta, the value of which, over any charges thereon, was more than sufficient to pay the full amount of said two bills.

All bills drawn upon such unsettled various shipments had been paid, and the only outstanding obligations arising under said agreement, were the two bills above mentioned.

The relief demanded was, that the goods held by the New York house at the time of their failure, or the proceeds thereof, being the unsettled various shipments above mentioned, be applied to the payment of the said two bills, and that the defendants Buckley & Mozle, as assignees, account and pay over to the plaintiffs one-half of any balance there may be.

W. Z. Larned, for plaintiffs.

T. C. T. Buckley & J. W. Gerard, for defendants.

MONELL, *J.*—The question in this case arises between the plaintiffs and the general creditors of Troost, Schmidt & Company, represented by their assignees, Messrs. Buckley & Mozle. The property in question, or its proceeds, passed to the assignees under the general assignment, and is held by them upon the trusts therein declared.

If a general partnership, or what was in the nature of a general partnership, existed between the plaintiffs and Troost, Schmidt & Company, under the agreement of January, 1864, in respect to the transactions conducted under such agreement, then the property of such partnership must be applied to the payment of the partnership debts. If, however, each shipment was intended and understood to be a single and independent transaction, having no connection with any others preceding or following it, then, as claimed by the defendants, the plaintiffs have no equity to be protected against their liability upon the bills in question.

The relation of the parties is to be ascertained—*first*, from the agreement; and, *second*, from the course of business transacted under it.

That a general partnership may exist in respect to a *single adventure*, cannot be doubted (*Collyer on Part.*, §§ 17, 55); and it may also be made to extend over any number of adventures agreed upon by the parties. Under such an agreement, the partnership becomes general, only for the purposes of such adventure or adventures, and for no other purpose, and it subjects the partners to all the liabilities and gives them all the rights of general partners in the particular adventure (Hughes *v.* Burge, 9 *Com. B.*, 431; Salomons *v.* Nisson, 2 *T. R.*, 675).

To constitute a general partnership nothing more is necessary than that the parties agree to carry on or conduct a specified business, and to share in its profits and losses. The business may be of a general nature, or it may relate and be confined to certain designated transactions. In either case the partnership becomes general.

In this case the parties agreed to carry on a business between Calcutta and New York, upon joint account. The particular kind of business was the shipment of goods (the description not designated), from Calcutta, for sale in New York. They provided for the mode of payment; the manner of sale; the division of profits and the sharing of losses. No period of duration was prescribed, and there was no limit to the amount or number of shipments.

Under such an agreement it cannot be doubted that the parties became general partners.

But it is claimed that such partnership was limited and confined to *each shipment*, and that any liability incurred for one shipment could not attach to another; and in support of this the clause in the agreement, "that the profit and loss shall be equally divided between the parties, *and settled in New York upon the winding up of each shipment*," is relied upon.

It was doubtless the intention of the parties that there should be frequent and speedy settlements, and that their transactions should not run for any great length of time without being closed. It was for the interest, and probably for the convenience, of both, that returns should be made upon the termination of each adventure. The house in Calcutta was interested in receiving its share of the profits, and the house in New York in being reimbursed for any loss. Hence, they provided that any deficiency in the sale of goods, upon which advances had been made, should be collected from the owners in Calcutta, and any losses arising from remittances to England should be borne equally. So far, therefore, as it was practicable, or possible, each shipment was to be wound up, and its results ascertained. Other parts of the agreement, however, seem to indicate quite clearly, that the provision I have quoted was not designed to control the manner of doing business, or to absolutely require the complete isolation of each shipment, so as to render it a separate transaction not to be affected by any other. The goods were to be purchased and shipped in the discretion of the parties in Calcutta, and sold in the discretion of the parties in New York. The latter were to remit to meet the bills drawn against the shipments, at the time of sale, *whether before or after the bills became due.* It might happen that bills would mature before favorable sales could be made, and the bills go to protest with the goods on hand; and it could not, therefore, have been the intention to deprive the parties of the right, as it seems to me it would have been their duty, to take any other of their joint property to meet their engagements. Besides, the winding up of each shipment is, in express terms, confined and restricted to the settlement of the *profits* and *losses* of such shipment, and not to the payment of bills drawn against the same.

The agreement, therefore, did not, in my opinion, make each

shipment a separate transaction, so as to take from it any of the characteristics of a general partnership as to all.

The course of business also gave a construction to the agreement. The answer admits that at the time of the assignment there were on hand unsettled "various shipments made under the arrangement," and that the goods and assets mentioned in the schedule annexed to the complaint, were portions of such shipments remaining undisposed of. Such portions were the remnants of distinct shipments by *seven* different vessels, arriving at different periods, none of which had been closed or settled. Besides, goods sent by the "Medura" and "Audubon," against which the drafts in question had been drawn, were long since sold and the avails used in paying other bills.

Thus the parties in New York did not, practically, admit any obligation to separate each transaction, or to close each distinct shipment.

It is clear, therefore, I think, both from the agreement and the course of business under it, that the parties intended their relations to the business should be that of general partners, subjecting themselves to all the liabilities of partners, with their corresponding rights.

From this conclusion it necessarily follows, that any goods or assets in the hands of the New York parties, being the property of the joint enterprise, whenever shipped, must be applied to the payment of the joint debts. Smith *v.* Wright, 1 *Abb. Pr. R.*, 243.

The defendants, Buckley and Mozle, are mere trustees and not purchasers. They acquired no other right or title to the property in question than their assignees, Troost, Schmidt & Co., had. In the hands of the latter, equity would give the creditors of the Calcutta and New York firms, a preference over the individual debts of either, and the goods or assets must be subjected to the same equity in the hands of their assigns.

The plaintiffs, therefore, are entitled to an account from the defendants, Buckley and Mozle, of all property and assets, which came into their possession under the assignment, and which was derived from the joint adventures of the plaintiffs and Troost, Schmidt & Co., for which purpose there must be a reference.

The plaintiffs must also have judgment, that out of said assets and property, if sufficient, the said assignees pay to the plaintiffs the amount of said outstanding drafts, or so much thereof as said assets and property will pay; and if any balance remains, that said assignees pay to the plaintiffs their costs of this action, to be taxed, together with the one equal half of the residue, if any.

CROMWELL *against* STEPHENS.

New York Common Pleas; Special Term, June, 1867.

MEANING OF THE TERM "HOTEL."—INJUNCTION.

The plaintiff occupied, in the City of New York, a building which was a large structure of eight stories, each story consisting of lodging rooms adapted to the use of one person only. Above the basement, it was used exclusively as a lodging house. The rooms were small, viz: from four to six feet wide and eight feet long, and were let to lodgers, at a fixed rate per night. There were no arrangements for boarding or cooking for guests, the house above the basement being adapted only for lodgings, nor was there any bar or restaurant belonging to or connected with the plaintiff's occupation of the building. The Croton water was partially supplied throughout the building, but during half of the day it did not usually rise above the basement, in consequence of deficiency of the supply.

Held, that this structure was not chargeable "as a hotel" with the Croton water tax payable by *hotels*.

It seems that such a building is a "hotel" in the legal sense of that term as ordinarily employed.

The legal definitions of "inn," "hotel," and "boarding-house,"—compared.

An injunction will be granted to restrain the Croton Aqueduct Board of the City of New York from cutting off the Croton water from the plaintiff's building, on the ground of non-payment of the water-rate, where the rate charged by them, and for non-payment of which they claim to stop the supply, is more than is authorized by law.

Motion for an injunction.

This action was brought by Charles T. Cromwell against

Thomas Stephens and others, composing the Croton Aqueduct Board, for the purpose of obtaining an injunction to restrain the Board from stopping the supply of the Croton water to a building owned by the plaintiff. The question involved turned upon the character of the building, and the mode in which it it was used; the facts respecting which are stated in the opinion of the court.

DALY, F., J.—This is an application for an injunction to restrain the Croton Aqueduct Board from cutting off the Croton water from a large building at the corner of Frankfort and William streets, owned by the plaintiff, which is used as a cheap lodging-house.

The ordinance of the city corporation, establishing the rate of water rents, provides that hotels and boarding houses shall, in addition to the regular rate for private families, be charged for each lodging room, at the discretion of the Croton Aqueduct Board. The Board, upon the assumption that the plaintiff's building is a hotel, have imposed an additional tax of $180 annually. The plaintiff insists that it is not a hotel, and has refused to pay the additional tax, in consequence of which the Board have notified him that they will, if it is not paid, cut off the Croton water from the building; and the present application is to stay them from carrying that resolution into effect.

It appears that the building is a large structure of eight stories, each story consisting of lodging rooms, adapted to the use of one person only, and above the basement it is used exclusively as a lodging-house; that the rooms are very small, being from four to six feet wide and eight feet long; that they are intended for poor people, being let at the small rate of twenty-five cents per night, and the water used in each room does not exceed, upon an average, a pint a day, whereas the rooms in ordinary hotels are four times as large, can be occupied by four times as many persons, and the water used in such rooms is ten times greater; that there is not a sufficient supply of Croton water above the first-floor; that four-fifths of the time it does not rise above that floor; that between seven o'clock in the morning and six in the evening there is no supply above the basement, and it could not be obtained be-

tween these hours for the use of the floors above, unless it was carried up from the floor below, at a great expenditure of time and labor; that the water for the supply of the rooms and for cleaning and ordinary use, above the second-floor, is supplied by a huge tank, which the plaintiff has caused to be erected at his own expense in the attic, into which the rain-water flows that falls upon the roof; that there is no cooking for guests, the house above the basement being adapted only for sleeping in, and not one-quarter as much water is used by each individual as would be used in a private house with the same number of people; that upon an average sixty-five out of the one hundred and eighty rooms are untenanted, and yet the rate imposed by the Board is for one hundred and eighty rooms; that there is no bar or place for drinking or entertainment attached to the premises or connected with its occupation; there is a restaurant and a barber's shop in the basement, but each of them pays separately for the supply of Croton water which it receives.

This being the character of the building and of the uses to which it is applied, the question presented and the only one discussed upon the motion, is whether it is a "hotel;" a question the solution of which depends upon the meaning of that term.

Ordinarily, in a legal inquiry, it is sufficient to refer to some approved lexicographer to ascertain the precise meaning of a word. But this is a word of wide application, and as the meaning, which is to be attached to it in this country, has been the subject of much discussion upon the argument, it may be well to refer to its origin and past history, as one of the means of determining its exact signification. The word is of French origin, being derived from *hostel*, and more remotely from the Latin word *hospes*, a word having a double signification, as it was used by the Romans both to denote a stranger who lodges at the house of another, as well as the master of a house who entertains travelers or guests. Among the Romans it was a universal custom for the wealthier classes to extend the hospitality of their house, not only to their friends and connections when they came to a city, but to respectable travelers generally. They had inns, but they were kept by slaves, and were places of resort for the lower orders, or for

the accommodation of such travelers as were not in a condition to claim the hospitality of the better classes. On either side of the spacious mansions of the wealthy patricians were smaller apartments, known as the *hospitium*, or place for the entertainment of strangers, and the word *hospes* was a term to designate the owner of such a mansion, as well as the guest whom he received. (*Andrew's Lex.*) This custom of the Romans prevailed in the earlier part of the middle ages. From the fifth to the ninth century traveling was difficult and dangerous. There was little security except within castles or walled towns. The principal public roads had been destroyed by centuries of continuous war, and such thoroughfares as existed were infested by roving bands, who lived exclusively by plunder.

In such a state of things there could be little traveling, and consequently the few inns to be found were rather dens to which robbers resorted to carouse and divide their spoils than places for the entertainment of travelers. (*Historie des Hotelleries, Cabarets, &c., par Michel et Fournier, Paris*, 1851, *p.* 181.) The effect of a condition of society like this was to make hospitality not only a social virtue but a religious duty, and in the monasteries, and in all the great religious establishments, provision was made for the gratuitous entertainment of wayfarers and travelers. Either a separate building, or an apartment within the monastery, was devoted exclusively to this purpose, which was in charge of an officer called the hostler, who received the traveler and conducted him to this apartment, which was fitted up with beds, where he was allowed to tarry for two days, and to have his meals in the refectory, while, if he journeyed upon horseback, provender was provided by the hostler for his beast in the stables. (*Fosbroke's Monachism*, 238, 3d ed; *Davies* 2, 769.) In many countries this apartment or guest hall of a monastery retained the original Latin name of *hospitium*, but in France the word was blended with *hospes* and changed into *hospice*, and it afterward underwent another change. As civilization advanced and the nobility of France deserted their strong castles for spacious and costly residences in the towns, they erected their mansions upon a scale sufficiently extensive to enable them to discharge

this great duty of hospitality, as is still the custom among the nobility and wealthier classes in Russia, and in some of the northern countries of Europe. Borrowing, by analogy, from an existing word and to distinguish it from the guest house of the monastery, every such great house or mansion was called a *hostel*, and by the mutation and attrition to which these words are subject in use the *s* was gradually dropped from the word, and it became *hotel*. As traveling and intercourse increased the duty upon the nobility of entertaining respectable strangers became too onerous a burden, and establishments in which this class of persons could be entertained by paying for their accommodation sprung up in the cities, towns, and upon the leading public roads, which, to distinguish them from the great mansions or hotels of the wealthy, and at the same time to denote that they were superior to the *auberge* or *cabaret*, were called *hotelleries*, a name which has been in use in France for several centuries, and is still in use to some extent as a common term for inns of the better class, while the word hotel in France has long ceased to be confined to its original signification, and has become a word of a most extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction, or of celebrity. It is applied to a hospital, or hotel dieu, or to a town hall or hotel de ville, to the residence of a judge, to certain public offices, and to any house in which furnished apartments are let by the day, week or month. (*Roquefort, Etymologique Français, Paris*, 1829; *Dictionnaire de l'Academie Français*, 1798, *et Complement au Dictionnaire; Bescherelle, Dictionnaire Français*).

The word, though so long in use in France, is of comparatively recent introduction into the English language. The Saxon word *inn*, was employed to denote a house where strangers or guests were entertained, down to the time of the Norman invasion, and under the Norman rule it was, in the popular tongue, the word for the town houses in which great men resided when they were in attendance on court; several of which became afterwards legal colleges, under the well known titles of inns of court. (*Pearce*, 50.) In all legal proceedings, however, and wherever the Norman French was spoken, the

word *hostel* was the term for all such establishments. The places where entertainment could be procured for a compensation, to distinguish them from the inns, or great houses, where it was furnished gratuitously, were called in English common inns; while in Norman French, by a change analogous to that which had occurred in France, they were called first *hotelleries*, and afterward *hostries*. (*Year Books*, 42 E. iii., 11; 22 H. vi., 38; *Statutes*, 5 E. iii, c. xi.; *Fitzherbert's Abm.*, p. 2, 28; *Brooke's Abm.*, p. 4, 15; *Dyer* R., 158, a note; *Godb.* R., 347; *Kelham's Norman Dicty.; Law French Dicty.*, 1701.) To "host," was to put up at an inn; and "hostler," before referred to as the title of the officer in the monastery who was charged with the entertainment of guests, was the Norman word for inn-keeper, and was in use until about the time of Elizabeth, when the keeping of horses at livery becoming a distinct occupation, it was the term for the keeper of a livery stable (*Yelv. R.*, 67; *Cooke's Entr.*, 347) and afterward of the groom who has charge of the stables of an inn. (Calye's case, 8 Co. 32; *Bailey's Dictionary.*)

It appears from a note of Malone, referred to in Todd's edition of *Johnson's Dictionary*, that the word hotel came into use in England by the general introduction in London, after 1760, of the kind of establishment that was then common in Paris called an *hotel garni*, a large house, in which furnished apartments were let by the day, week or month. In *Barclay's Dictionary*, 1782; in the first edition of Walker, 1791, and in *Sheridan's Dictionary*, 1795, hotel is given as the proper pronunciation of *hostel*, an inn; and in the dictionaries of *Jones*, 1798, and of *Perry*. 1805, it is incorporated as an English word, and is defined in the latter to be "an inn, having elegant lodgings and accommodations for gentlemen and genteel families." *Todd*, 1814, defines it to be "a lodging-house for the accommodation of occasional lodgers, who are supplied with apartments hired by the night or week." The definition given by *Knowles*, 1835, is simply "a lodging-house." By *Smart*, 1836, "a lodging-house or inn." *Beid*, 1845, "an inn or a lodging-house." *Boag*, 1848, "an inn; and by *Dr. Latham*, in his edition of *Johnson's Dictionary*, "an inn of a superior kind."

The word was introduced into this country about 1797. Before that time houses for the entertainment of travelers in this city were at first called inns, and afterwards taverns and coffee-houses. In 1794 an association organized upon the principle of a tontine, erected in Wall street what was then a very superior house for the accommodation of travelers, called the Tontine Coffee-house; the success of which led to the formation of another company for the erection of one upon a still more extensive scale in Broadway. This structure, which was called the Tontine Tavern, was built about 1796, upon the site of what had been a famous tavern or coffee-house in colonial times, and from the extensive accommodation it afforded and the superior character of its appointments, it was then, and for many years afterward, the most celebrated establishment of the kind in the county. There was at that period a rage for everything French. The city was filled with refugees from France and from the French West India possessions, whose residence among us produced a great change in our social habits, amusements and tastes (*Watson's Annals*, 209), while a fierce party strife prevailed between those who advocated the principles of the French Revolution and those who condemned them. The French national airs were sung in the streets, men mounted the tri-color cockade, and the proprietors of the new tavern, falling in with the popular current, gave a French name to their establishment, by changing it from the Tontine Tavern to the City Hotel. The new word was afterward adopted by the proprietors of other houses for the entertainment of travelers in this and neighboring cities, and becoming general, found its way into American dictionaries. *Allison*, one of the earliest of American lexicographers, 1813, defines it to be "an inn of a high grade, a respectable tavern." *Webster* calls it "a house for entertaining strangers or travelers," and says that "it was formerly a house for genteel strangers or lodgers," but that "the name is now (1840) given to any inn." *Worcester's* definition (1846) is "a superior lodging-house with the accommodations of an inn; a public house: a genteel inn: an inn," and in the last edition of *Webster*, 1864, there is given an addition to the previous general definition: "An inn; a public house, especially one of some style or pretensions."

It is to be deduced from the origin and history of the word and the exposition that has been given of it by English and American lexicographers that a hotel, in this country, is what in France was known as a *hotelerie*, and in England as a common inn of that superior class usually found in cities and large towns. A common inn is defined by Bacon to be a house for the entertainment of travelers and passengers, in which lodging and necessaries are provided for them and for their horses and attendants. (*Bac., Abm., Inns., B.*) In Thompson *v.* Lacy (3 *B. and A.*, 283), Justice Bayley declares it to be "a house where a traveler is furnished with everything which he has occasion for while upon his way," and, in the same case, BEST, J., says it is "a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." But a more practical idea of what was understood at the common law as common inns, may be gathered from Hollingshed's description of them, as they existed in the days of Elizabeth. "Every man," says that quaint chronicler, "may in England use his inn as his own house, and have for his monie how great or how little varietie of vittals and whatsoever service himself shall think fit to call for. If the traveler have a horse, his bed doth cost him nothing, but if he go on foot, he is sure to pay a pennie for the same. Each comer is sure to be in clean sheets wherein no man hath been lodged since they came from the laundress or out of the water wherein they were washed. Whether he be horseman or footman, if his chamber be once appointed, he may carry the key with him as of his own house as long as he lodgeth there. In all our inns we have plenty of ale, biere, and sundrie kinds of wine; and such is the capacity of some of them that they are able to lodge two hundred or three hundred persons and their horses at ease, and with very short warning (to) make such provision for their diet as to him that is unacquainted withall may seem to be incredible." (*Holingshed's Chronicle—Description of England.*) And another observer (Fynes Moryson), writing before 1614, adds: "If the traveler eats with the host or at the common table his meals cost him sixpence, and in some places

fourpence; but if he will eat in his chamber he commands what meat he will, and the kitchen is open to him to order the meat to be dressed as he likes best." (*The Itenerary, pp.* 111–151.)

In the above-mentioned case of Thompson *v.* Lacy, the defendant kept a house in London called the Globe Tavern and Coffee-house, where he furnished beds and provisions to those who applied. No stage, coaches or wagons stopped there, nor were there any stables belonging to the house. The question was whether this was an inn, and it was held that it was. "The defendant does not charge," said BEST, J., "as a mere lodging-house keeper by the week or month. * * * A lodging-house keeper, on the other hand, must make a contract with every man that comes, whereas an inn-keeper is bound, without making any special contract, to provide lodging and entertainment for all at a reasonable price." In Doe *v.* Lansing (4 *Camp.*, 76), decided before the above, Lord ELLENBOROUGH held that a coffee-house in London, where persons from the country lodged, was not an inn; and in an earlier case, (Parkhurst *v.* Foster, 1 *Salk.*, 387), it was held that an establishment at a watering-place, where persons were taken to lodge, in which dressed meat was furnished to them at four pence per joint, and small beer at two pence per mug, and to whom stables were let to their horses, was not an inn. Neither of the cases are fully reported, and if maintainable, it must be upon the ground that these were not houses for the general reception of travelers, but places where either a lodging or certain articles of food, or the stabling of a horse, could be procured by paying for each in contradistinction to the general entertainment which an inn supplied to all travelers or guests at a reasonable charge. In Dausey *v.* Richardson (2 *Ellis & Bl.*, 144), it was held that a boarding-house was not an inn, the distinction being put upon the ground that a boarder being received into a house is owing purely to a voluntary contract, whereas an inn-keeper, in the absence of any reasonable or lawful excuse, is bound to receive the guest when he presents himself. "The inn-keeper," said COLERIDGE, J., in The King *v.* Ivens (7 *C. & P.*, 213), "is not to select his guests. He has no right to say to one you shall come into my

inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received;" inn-keepers, he said, being a kind of public servants, having the privilege of entertaining travelers, and of supplying them with what they want. In Seward *v.* Seymour (*Anthon's Law Student*, 51), it was held that a well-known establishment which formerly existed in this city, called the Atlantic Hotel, had a double character, being both a boarding-house and an inn; that in respect to those who occupied rooms and were entertained under precise contracts, it was a boarding-house, while with respect to transient persons, who, without any stipulated contract, remained from day to day, it was an inn; and this definition of an inn was substantially given by Chief Justice OAKLEY in Wintermute *v.* Clarke (5 *Sandf.*, 247), as a house "where all who come are received as guests, without any previous agreement as to the duration of their stay, or as to the terms of their entertainment." In Willard *v.* Reinhard (2 *E. D. Smith*, 148), the distinction between a boarding-house and an inn was declared to be this: in a boarding-house the guest is under an express contract at a certain rate for a certain period of time, but in an inn there is no express engagement, the guest being on his way is entertained from day to day, according to his business, upon an implied contract. And in Carpenter *v.* Taylor (1 *Hilt.*, 195), it was held that a restaurant, to which a person resorts for the temporary purpose of obtaining a meal, is not an inn. "On the contrary," said INGRAHAM, J., "as the customs of society change and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes. Mere eating-houses cannot now be considered as inns. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers, and though the defendant may carry on in another part of his premises the business of an inn-keeper, it does not follow that the liability for that part of the premises is to be extended to the whole. To which it may be added, with equal force, that a mere lodging-house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn.

It follows from these authorities, that an inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home. This, as accurately as I am able to state it, is the legal definition of an inn, and this is exactly what is understood in this country by a hotel. It is customary, especially in our cities, to let out furnished apartments in houses, by the week or by the month, without meals, or with breakfast simply; but we do not, as the French do, call such houses hotels, but merely lodging-houses. (*Worcester's and Webster's Dictionaries.*) We have in the cities houses of entertainment in which the guest or traveler pays so much per day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it. Where the restaurant forms a part of the establishment, and the house is kept under one general management for the reception of all travelers, or guests that may come, it is an inn, there being no material difference between it and the Elizabethan inn, in which the traveler paid separately for his apartment and for each meal. It differs from a boarding-house, for the reason that all who come are received, and because the guest engages for no specific period, but pays only for the time he is there.

In Smith *v.* Scott (9 *Bing*, 14; 2 *Moo. & S.*, 35), it was held that a woman who kept a house without any public sign, in London, in which she let rooms to families or single men for long or short periods, and, if required, found cooked provisions for them, upon which she charged a small profit, receiving her orders usually every Monday and her payment at the end of the week—the house being open at all hours to any person who came—was a hotel-keeper, within the meaning of the Bankrupt Act of 6 Geo. IV., ch. 16, §2, which enumerates "victualers, keepers of inns, taverns, hotels and coffee-houses," as among the classes of persons who may be declared bankrupt. C. J. TINDALL put the decision upon the ground that

some distinction must have been intended, as the word which immediately precedes hotel in the act is inn, and that it could scarcely have been intended to designate the same thing by both words. He was of opinion that hotel was not used in the sense of the old word *hostel*, "for that," he said, "means what is now termed an inn." "The modern word," he remarked, "was introduced from the French, and rather implies a house to which people resort for lodging than for the sort of entertainment which is to be procured only at an inn;" and GASELEE J., said that there might have been a doubt if the party had only received lodgers occasionally, but as the house was open to any comer, and all who frequented it were supplied with provisions to some extent, he regarded it as a hotel. It is sufficient to say in respect to this case that it may be that in London the word hotel is not applied to an inn; that there it has undergone no change, but still is limited to the signification which it originally had when introduced there. Such is not, however, the case in this country, where the word has been long in popular use to designate what in the law is denominated an inn.

I have discussed the meaning of this word closely, for the reason that it is an embarrassing question whether the building owned by the plaintiff is, or is not, a hotel. As contradistinguished from a boarding-house, it is public in its character, being open to all comers, and two of the principle wants supplied by an inn, lodging and meals, can be obtained there; but not under any general arrangement, as the restaurant is kept by one person and the lodging-house by another. The proprietor of the restaurant does not engage to provide lodgings for those who come to his restaurant for entertainment, and the keeper of the lodging-house lets out his rooms for twenty-five cents a night, without any stipulation, express or implied, to furnish those who take them with meals. Each is independent of and has no control over the other, and neither in his separate capacity could be regarded as the keeper of an inn, liable to that extraordinary responsibility for the safe keeping of the property of guests, which the law imposes upon that class of bailees. If the cases to which I have reference (Parkhurst *v.* Lansing, 1 *Salk*, 387, and Doe *v.* Lansing 4 *Camp*,

76), were correctly determined, it is not an inn, and in the best view I can take of it, though the point is not free from doubt, it is not that kind of house for the general reception of travelers, which in this country is known as a hotel.

But though the uses to which the building is applied may not, in the legal or in the popular acceptation of the term, make it a hotel, it might still be deemed one in the sense of an ordinance regulating the rate to be paid for the supply of Croton water, if it were apparent that it was a kind of establishment for which the ordinance manifestly meant to provide. A huge lodging-house, supplied from roof to cellar, would consume as much water, and should be required, as well, to pay proportionally for the use of it, as a smaller building coming strictly within the definition of a hotel. The whole design of the ordinance was to regulate the tax according to the consumption, and for this purpose hotels and boarding-houses, in addition to the rate paid by private families, are to be charged for each lodging-room, and it is left to the discretion of the Croton Aqueduct Board to determine what the charge per room shall be. There are 180 lodging-rooms in the plaintiff's building, and the Board have imposed an annual tax of $180 or $1 for each room. It is but a just interpretation of the ordinance, however, to suppose that the design of it was that each lodging-room supplied with water in such an establishment, should be separately charged for, and not that a tax should be imposed where water cannot be supplied. During one-half of the twenty-four hours, the Croton water does not rise beyond the basement of the plaintiff's building, in consequence of the number of mechanical and other establishments in this particular locality, which, throughout the day, drain and greatly diminish the supply. Unable to procure by the ordinary flow of the aqueduct what is required for the lodging-rooms above the first-floor, the plaintiff, as already stated, has been compelled to build a tank to receive the rain water from the roof, obtaining by that means what could not be obtained from the supply of the aqueduct. While, therefore, I am disposed to think that a large lodging-house, to which water is freely supplied, would come within the intention of the ordinance, I am of the opinion that the plaintiff's build-

ing does not. It is not strictly within the words of the ordinance, as it is not what is popularly known as a hotel, and it is not such an establishment as could have been contemplated by it, as it is not to be supposed that there was an intention to tax a man for all the lodging-rooms of a building if water could not be supplied to them, and he is compelled to obtain it elsewhere. It is a case, in my judgment, coming under the portion of the ordinance which provides that matters not mentioned are to be arranged by a special contract, and not under the one which imposes a charge upon each lodging-room. I shall, therefore, grant the injunction.

WEBSTER *against* NOSSER.

New York Common Pleas; General Term, 1867.

LANDLORD AND TENANT.—ACTION ON COVENANTS.

An action for the breach of a covenant upon the part of a lessee that he will make repairs during the term of the lease; or upon a covenant that he will not make alterations in the leased premises, without the consent of the lessor, may be maintained by the lessor without awaiting the expiration of the term of the lease.

Appeal from a judgment of the District Court for the Sixth District.

This action was brought by Josephine Webster against August L. Nosser to recover damages for a breach of covenant entered into by the defendant with the plaintiff, in a lease. The Justice of the District Court before whom the cause was tried dismissed the complaint, and from his judgment the plaintiff appealed. The nature of the claim of the plaintiff appears in the opinion of the court.

Roswell D. Hatch, for appellants.

Townsend & Levinger, for respondents.

By the Court—BRADY, J.—The defendant covenanted that he was to do and make all repairs during the term of the lease between him and the plaintiff, and to quit and surrender the premises at the expiration of the term in as good state and condition as they were at the commencement. He also covenanted that he would not make any alterations on the premises without the consent in writing of the lessor, under the penalty of forfeiture and damages.

This action was brought to recover damages sustained by a violation of both these covenants, viz: for a failure to make repairs and for alterations made without the consent of the plaintiff. On the trial the plaintiff proposed to show that the defendant should have made repairs, and "admitted that the lease had two years to run." The defendant objected; and the justice held that the plaintiff might show that the tenant had violated the covenant so far as not to make repairs which were essential to prevent the freehold from falling into decay. The plaintiff was permitted, however, to give evidence upon the subject of alterations; but when the plaintiff rested, the defendant's counsel moved to dismiss the complaint, on the grounds: 1. That the term was unexpired; and, 2. That there was no evidence showing irreparable damage to the building, or any waste, or any deterioration on the value of the premises, in consequence of the alteration proved to have been made, or proper evidence of the amount of damages, if any there were. The complaint was, upon this motion, dismissed, and the plaintiff's case failed in both causes of action.

The justice seems to have been of the opinion that the plaintiff could not recover for repairs, because the defendant's term was unexpired, and such repairs were not essential to prevent the freehold from falling into decay, and that for some reason, but what does not clearly appear, the plaintiff was not entitled to recover, although alterations had been made without his consent.

In both of these views he was in error.

It has been determined in this State that an action on a covenant similar to that of the defendant to repair, could be maintained during the term (Schnefflin *v.* Carpenter, 15 *Wend.*, 400, and cases cited). Chief-Justice Holt, in the

case of Vivian *v.* Campion, 1 *Salk. Rep.*, 139, 2 *Ld. Ray*, 1,125, said: that the jury should give as much damages as it would cost to put the premises in repair, but none in respect to the length of time they continued in decay; that it was not a hard action; that good damages were always given in such cases, because the damages ought to be applied to the repair of the premises. In this suggestion we have the reason of the rule. The lessee is required to perform his covenant, when it is broken, by paying to the lessor in damages a sum sufficient to make the repairs which are necessary, and which should have been expended by him, and nothing more. (See Shortridge *v.* Lamphigh, 2 *Ld. Ray*, 798; 7 *Mod.*, 71.) It would seem to follow, as the award is in its nature a decree for a specific performance, that the sum given would, on a proper application in equity, be appropriated to the performance of the repairs, so that the lessee might have the benefit of such application during the balance of his term.

A violation of the covenant not to make alterations is also attended with consequences of immediate liability. The covenant being broken, the rule is universal that a right of action at once acrues, unless there is something in the agreement of which it is a part only, to the contrary. Such is not the case here. On the contrary, the covenant provides that alterations shall not be made, under penalties of forfeiture and damages. In the case of Vickery *v.* Jackson (2 *Starkie Rep.*, 260), which was an action of ejectment on forfeiture for breach of covenant, it appeared that the lease contained a covenant to repair within three months after notice, and also a general covenant to repair. The evidence of delapidation principally relied on was, that the defendant had broken a doorway through the wall of the demised house on to the adjoining house. It was contended on the part of the defendant that the breach had been waived by acceptance of rent after notice given, and it was said on his behalf that it always had been his intention to rebuild the wall before the end of his term; but Lord Ellenborough held that this was a continuing breach and a want of repair which amounted to a forfeiture. The removal of the partition described by the witnesses in this case was an alteration of the premises, if it were

not a violation of the covenant to repair. Whether the premises were injured by the alteration, was a question of fact which the justice did not consider, it would seem, having dismissed the complaint because the action was brought during the term. If such be not the case, the judgment was erroneous, inasmuch as the evidence given entitled the plaintiff clearly to damages. The covenant was broken, and it was shown that it would cost, as shown, about $200 to restore the partition removed.

The judgment must be reversed.

STANNARD *against* EYTINGE.

New York Superior Court; General Term, May, 1867.

PLEADING. — ACTION FOR MONEY LOST AT PLAY. — FORM OF COMPLAINT.

A complaint in an action to recover back money lost at play by the plaintiff to the defendant, which merely states that the defendant won at gaming of the plaintiff a specified sum, with an averment of demand and indebtedness, and a reference to the statute, does not state facts sufficient to constitute a cause of action.

Such complaint should aver that the money was lost and was paid or delivered to the defendant, or should otherwise show that the money was actually received by him.

Where a complaint in an action is defective for not stating facts sufficient to constitute a cause of action, the defect is not waived by the defendant answering it; but may be objected to upon the trial notwithstanding.

Appeal from a judgment dismissing a complaint.

This action was brought by John Stannard against Henry S. Eytinge, Christian W. Schaffer and John A. Worshman. The plaintiff's cause of action was stated in his complaint in these terms:

"The plaintiff, complaining, shows that the defendants, on or about the 13th of September, 1865, won, at gaming, of the

plaintiff, the sum of $861, whereby the defendants became indebted to the plaintiff in the aforesaid sum, and the plaintiff immediately thereafter demanded the said sum of the defendants. And the plaintiff alleges that an action accrued to him to recover said sum with interest, according to the provisions of the statute against betting and gaming; wherefore the plaintiff demands judgment against the defendants for the sum of $861, with interest from the 13th of September, 1865."

The defendants, in their answer, denied each and every allegation of the complaint.

The Justice before whom the action was tried dismissed the complaint, and judgment was entered for the defendants against the plaintiff.

From this judgment the plaintiff appealed.

George W. Paine, for the appellant.

Roger A. Pryor, for the respondents.

By the Court—GARVIN, J.—It is enacted that "all wagers, bets, or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. And all contracts for an account of any money, or property, or thing in action so wagered, bet, or staked, shall be void." (1 *R. S.*, sec. 8, page 662.) The fourteenth section of the statute against betting and gaming provides: "Every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose at any time or sitting the sum or value of twenty-five dollars or upward, and shall pay or deliver the same or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost and paid or delivered from the winner thereof." Without this statute, the plaintiff would have no right of action for the money lost and paid. By this statute, the right of action is plainly given to the loser; other enactments prescribed the form of the declaration in different actions—one was debt, another assumpsit. (2 *R. S.*, page 663, §§ 1, 2.) These designations have been abolished by the Code (§ 69).

It is contended by the plaintiff that the court erred in dismissing the complaint. This depends upon the construction to be given to the second subdivision of the 142d section of the Code, which enjoins a plain and concise statement in the complaint of the facts constituting a cause of action. The first section of the Revised Statutes, as to the form of declaration in debt is * * * * It shall be sufficient for the plaintiff, without setting forth the special matter, to allege in his declaration that the defendant is * * * * * indebted to the plaintiff in the sum so received, whereby an action accrued to the plaintiff, according to the statute against betting and gaming. The second section provides that it shall be sufficient for the plaintiff, without setting forth the special matter, to allege in the declaration that money was received, contrary to the provisions of such statute upon betting and gaming. Under the first section the action was debt, under the latter it was assumpsit. This complaint was drawn under the first section in analogy to the action of debt before its abolition by the Code. Upon one of these two sections the plaintiff claims to stand.

It seems clear that certain things are abolished by the Code, and others are modified:

First, the declaration; second, the old names and terms of action; and, third, the forms of pleadings, provided such form is inconsistent with the Code; thus the complaint is substituted for the declaration, and the civil action (so far as applies to the protection of private rights and redress of private wrongs) in the place of all old forms of action, and the plain and concise statement of facts constituting a cause of action, instead of the old forms of pleadings, where they are inconsistent with the Code. (See § 468.)

This brings us to the statutory pleading under the first section of 2 *R. S.*, 363. The only allegations necessary under that section are: that the defendant is indebted to the plaintiff in the sum (plaintiff claims) whereby an action accrued to the plaintiff according to the statute against betting and gaming. This the statute declares sufficient without setting out the special matter; or, in other words, without setting out the facts as they exist, and upon which the action must rest at the trial—or, in the language of the Code, the facts which consti-

tute a cause of action. What are those facts? The statute is that every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose the sum of $25 or upward, and shall pay or deliver the same or any part thereof, may sue for and recover the money from the winner; thus we are at no loss for the facts constituting this cause of action—they are losing money by playing at any game, and paying or delivering the money. Upon these facts he may sue for and recover the money so lost and paid, or delivered. I think the provisions of the first section are changed, and modified, so far as they are inconsistent with those of the Code. It is possible, if the complaint had been framed upon the second section and in its language, it would have been good pleading. That requires an allegation that the money was received. If received by the defendants, it might be said, it must have been paid; however, this may be doubtful; but it is not necessary to pass upon the second section, inasmuch as the complaint is clearly drawn upon the first. Again, there is no allegation that defendants received the money, which would be a fatal objection to the complaint under section two, without other equivalent allegations which it does not contain. The complaint does not conform to the Code. The allegations omitted are: that the money was lost and paid or delivered to the defendants, whereby an action accrued. With this addition the complaint would have been good. Its material defect is not waived by the defendant's answering; all other defects in the complaint are waived so far as they apply to this case, excepting that of insufficiency of statement of facts to constitute a cause of action (§ 148), which may be taken advantage of upon the trial. The statute gives the plaintiff a remedy. He must pursue the course fixed by law to attain it. If this course is not adopted we cannot aid him. The defendants are to be made to respond in the way pointed out for the redress of private wrongs, and in no other. We cannot go beyond the limits assigned us by the authority under which we act.

The judgment should be affirmed with costs.

ADAMS *against* HOUGHTON.

New York Common Pleas; General Term, June, 1866.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—EXECUTION.—ACKNOWLEDGMENT.

Under the Act of 1860 (Laws of 1860, 594)—regulating assignments—an assignment for the benefit of creditors must be acknowledged by the debtor in person. It cannot be acknowledged by his attorney or proved through the medium of a witness.

Appeal from a judgment rendered upon trial by the Court.

This action was brought by Charles S. Adams, receiver, against Charles W. Houghton, Columbus Hart, James W. Hart and William J. Davidson. The plaintiff sued as receiver of the defendants, the Harts and Davidson. His complaint showed the recovery of judgment against those defendants, the issuing and return of execution, the institution of supplementary proceedings, and the appointment, and qualification of the plaintiff as receiver. It further showed that the defendants Columbus Hart and Davidson, for themselves and in the name of James W. Hart, Columbus Hart acting as his attorney, executed to the defendant Houghton, as trustee, an assignment for the benefit of creditors, under which Houghton had taken possession of assets of defendants. It prayed judgment that the assignment be adjudged fraudulent and void, that the defendant Houghton account for the property received under it, and deliver up the same to the plaintiff, as receiver, and for an injunction and further relief.

The principal ground upon which the plaintiff claimed that the assignment was void was that instead of being executed and acknowledged by all the defendants in person, the defendants Davidson and Columbus Hart, only, executed and acknowledged the instrument personally, while on the part of

James W. Hart it was subscribed and acknowledged by Columbus Hart as his attorney.

A written power of attorney from James W. Hart to Columbus Hart to execute, &c., an assignment preferring creditors duly acknowledged was filed with the assignment and appeared by the complaint.

On the trial of the action the Judge found that the execution and acknowledgment of the assignment were duly made and were valid, and he therefore dismissed the complaint.

From this judgment the plaintiff now appealed.

Griswold & Dickinson for the appellants.

D. T. Walden for the respondent, contended: I. That the assignment was duly *executed*. One or more of several partners may make an assignment for the benefit of creditors, if authorized so to do by the other partners. (Fisher *v.* Murray, 1 *E. D. Smith*, 341; Sheldon *v.* Smith, 28 *Barb.*, 592; Robinson *v.* Gregory, 29 *Barb.*, 560; Kelly *v.* Baker, 2 *Hilton*, 531; Baldwin *v.* Tynes, 19 *Abbott*, 32.)

The power of attorney executed by James W. Hart expressly authorized the making of the assignment by the other partners.

II.—The assignment was duly acknowledged, as required by the act of 1860, chap. 348. The act requires only that the assignment shall be acknowledged (§1). The parties executing this assignment were William J. Davidson and Columbus Hart, and they both duly acknowledged it. Strictly, the partner, James W. Hart, did not make the assignment; it was made by the other partners for him, by his authority. The act of 1860 has not changed the law in relation to the manner of executing an assignment. An assignment may now be executed as prior to the act. The Legislature have in addition required that the parties executing the assignment shall acknowledge the execution before an officer duly authorized. If in this case, the partner, James H. Hart, is presumed to have made the assignment through his attorney, then the acknowledgment by his attorney in pursuance of his power, must be considered the act of his principal. In Cook *v.* Kelly (12 *Abbott R.*, 35; 14 *ib.*,

467), and Fairchild *v.* Gwynne (16 *ib.*, 23), the assignment was not acknowledged by those who signed it. The power of attorney was acknowledged (Lovett *v.* Steam Saw Mill Ass., 6 *Paige*, 54, 60; Johnson *v.* Bush, 3 *Barb. Ch.*, 207, 240; Baldwin *v.* Tynes, 19 *Abbott*, 32.)

By the Court—BRADY, J.—The statute of 1860 (Laws, p. 594), is mandatory. (Fairchild *v.* Gwynne, 16 *Abbott Pr. Rep.*, 23). And it requires that every assignment for the benefit of creditors shall be in writing, and shall be duly acknowledged. It is an affirmative statute, introductory of a new law and directing a thing to be done in a certain manner; that thing shall not, even although there are no negative words, be done in any other manner. (*Dwarris on Statutes, p.* 641.) The execution cannot therefore be proved by a subscribing witness. (Cook *v.* Kelley (12 *Abbott Pr. Rep.*, 35; same case, 14 *Abbott Pr. Rep.*, 466). The statute contemplates an acknowledgment by the debtors making the assignment and not by their attorney, or through the medium of a witness. The object is to secure the coöperation of the debtors and their disclosures of the assets belonging to them. Hence, it provides that the debtor or debtors shall make and deliver an inventory or schedule to the county judge of the county in which such debtor or debtors resided at the date of the assignment, and that an affidavit shall be made by such debtor or debtors, and annexed to and delivered with such inventory or schedule, that the same is in all respects just and true according to the best of such debtor or debtor's knowledge and belief. It is true that the schedule mentioned may be made after the assignment is executed, but the formula prescribed is evidence of the design of the legislature to exact a united action on the part of joint debtors personally and not by representation. There is no difference in effect between proof by a subscribing witness and an acknowledgment by an attorney delegated to execute the assignment, neither being the direct act of the assignor; and so far as the schedule is concerned it by no means follows that an attorney has any knowledge of the property of the firm which he assists in transferring. If an assignment may be executed and acknowledged by an attorney appointed for that purpose by one

of the debtors, it may be executed and acknowledged in the same way as to all, and the abuses which the statute was intended to prevent still prevail to the detriment of the creditor. (See op., MULLEN, J., in Fairchild *v.* Gwynne, 16 *Abbott, supra, p.* 31). In such a case the debtors would not assume the obligations or incur the penalties of any false statements contained in the inventory or schedule; and the inventory, however false, might so far as the attorney is concerned, be correct according to the best of his knowledge and belief. Such is not the knowledge and belief required. It is that of the debtor which the statute exacts, and it is this which must be expressed.

It may be said that this view of the question presented will render it impossible to execute an assignment where the debtor or one of them is absent or is a resident of a foreign country, but this is not necessarily the result. The laws are ample for such cases. Acknowledgments may be made abroad before the officers authorized to take them. It may prevent hasty or ill considered assignments, or the intentional absence of debtors as a part of the fraud to be practised upon creditors, but whether either or all of those consequences follow is a matter for legislative interference. If the statute is too stringent and the debtors are asked to do things seemingly oppressive the law-makers must provide the remedy by relieving them of the burdens imposed. It may be said in addition to this, as to a partner resident abroad, that it is of great importance to the creditors that his oath, as to the assets immediately under his charge, should be furnished although it may be that under the section of the statute relating to the affidavits to be annexed to the schedule, the non-resident partner, not residing in any county in this State, would not be required to make it, in order to give validity to the assignment. It may also be said, that as to non-resident co-partners the statute does not and should not apply, with the same strictness as to residents. The general scope of the statute, all its provisions being considered with reference to the object in view, contemplates and includes resident co-partners and not necessarily members who do not reside in this country. But however that may be, and whatever may be the construction of the statute as to them, the present case is one of resident partners, one of whom executed a power

of attorney in an anticipation of an assignment, and then, absenting himself for what reason does not appear, continued to be absent when the assignment was made. The object of the statute was not accomplished, therefore, by the manner of executing the assignment in this case, and its mandates were not obeyed. The acts of all the partners, directly, in reference to the assignment and to the assigned estate were not secured, and the omission to distinguish the assignment by them renders it invalid.

The judgment of the Special Term should be reversed.

DALY, F., J., concurred.

CARDOZO, J., (dissented)—This case presents two questions under the statute of 1860, respecting assignments: viz., 1. can an assignment be executed by an attorney in fact; and, 2, what effect does the omission to file the schedules required by the statute have upon the assignment?

I think we shall arrive at a more accurate conclusion, and find less embarrassment by considering these questions separately.

1. It is too late in this Court to claim that the statute is merely directory, so far as it demands that the assignment shall be in writing and acknowledged by the parties executing it, and while my individual opinion, concurring with the view of Mr. Justice CLERKE in the case of Fairchild *v.* Gwynne (12 *Abb. Pr. R.*, p. 35) is, that the cases in which it has been decided that the statute in that particular is mandatory, are erroneous. I propose to consider the question now presented, and which I think will require but a few remarks, upon the conceded ground that, until reviewed by the court of appeals, the law should be considered settled that the statute in this particular is mandatory.

But I know of no decision, and I apprehend that on principle it will be difficult to say that there is anything in the statute which deprives an insolvent debtor of the right to grant a power to another, to execute an assignment for him.

That right certainly existed at common law, and unless by express words, or necessary implication, the statute under consideration has destroyed it, it still continues. Keeping in mind the familiar doctrine that the attorney acts in the name of the

principal, and that what he does within the limit of his authority, is the act of his principal, I do not see how it is possible to say that James W. Hart, the absent insolvent debtor, has not duly executed and acknowledged the assignment in question. He gave a special power to Columbus Hart and William J. Davidson, and each of them, to make the assignment for him, and it is acknowledged in his name, by them, as his attorneys. The assignment, therefore, so far as he is concerned, was made and duly acknowledged by him.

[The opinion then proceeds to discuss the other question; not adverted to in the opinion of the majority of the Court.]

GORI *against* SMITH.

New York Superior Court; General Term, April, 1867.

EXTRA ALLOWANCES.—MOTION.

Motions for extra allowance, under Section 309 of the Code of Procedure must be made upon papers.

Such a motion is addressed to the *Court*, and is not dependent upon the recollection or discretion of the particular Judge, as an individual.

Since the decision of the Court of Appeals, Dec., 1865, in The People *v.* New York Central Railroad (30 *How. Pr.*, 148,)—that orders for extra allowances, under section 309, are appealable—it is necessary that the facts upon which motions for such allowances are made should be presented in such a mode as to have them passed upon, on an appeal.

Appeal from an order made at Special Term at Chambers, granting an extra allowance.

The action was brought by Catharine Gori against Alfred C. Smith, jr. The complaint claimed $20,000 damages for non-completion of a contract for the purchase of land. The defendant in his answer, besides alleging a defense, set up a counter-claim for $20,000 damages for non-performance of such

contract by the plaintiff. On this claim the plaintiff took issue by a reply.

The action was tried before Justice McCunn, without a jury, in October, 1864. In September, 1865, the Justice rendered a decision in favor of the defendant, but delivered no opinion.

Three months after the decision was rendered, the attorneys of the plaintiff and defendant met at Chambers Special Term, which was then held by Justice McCunn, and the defendant's attorney made a motion for an extra allowance, on the ground that the action was a difficult and extraordinary one. The plaintiff's attorney resisted the motion. Justice McCunn made an order granting to the defendant $1,000 extra allowance.

No notice of motion or affidavits or other papers were read on such motion or served upon either party for the same.

The plaintiff now appealed to the General Term from this order. The only papers produced on the appeal as those on which the motion was heard, were the pleadings in the action. The order did not recite that any papers were used on the motion; but only that it was made by the Justice before whom the action was tried, "after hearing counsel on both sides."

The plaintiff moved at the same time to dismiss the appeal on the ground that the order was not appealable.

Joseph F. Daly, for plaintiff.

H. F. Hatch, for defendant.

By the Court—Robertson, Ch. J.—The Court of Appeals having held in the case of The People *v.* The New York Central Railroad (referred to in S. C. in 30 *How.*, 149), that an order for an allowance in addition to costs, was appealable, it becomes necessary that the facts on which the motion for them is made should be presented in such a mode as to have them passed upon by an appellate court on appeal:—The principle announced was, that "an order which peremptorily and finally charged a party with the payment of a sum of money more than he ought to pay affected his right not merely in form but substance also. In the same case, upon its return to the Su-

preme Court, it was suggested by that court (*ubi sup*) that parties claiming any additional sum ought to furnish the court with some specific facts, such as moneys actually expended or liabilities incurred by them, or time or labor consumed by them, counsel or servants, the time consumed on the trial, the number of trials and postponements, and of arguments at a General Term, and whether there was a long account involved or a reference had.

The presiding justice (BROWN) added, that without these the Court could not form an intelligent and satisfactory estimate of the sum to be awarded as a compensation and indemnity for the unusual and extraordinary character of the litigation. The Special Term order was reversed in that case simply because it was supposed to cover services after the entry of judgment in that court. The 52d general rule of court, it is true, provides that the application can only be made *to the court* before *which* the trial is had, *or the judgment rendered.* This has been supposed to mean *the judge*, but without reason. It is evidently meant to exclude appellate courts only, as judgment is rendered by a court, not by a judge, and "which" does not properly apply to a person. But even if it did mean the judge, the only object would have been to enable him to determine the proper amount, as to which his discretion is final. (Cook *v.* Dickerson, 5 *Sandf.*, 663; Dickson *v.* McElvain, 7 *How.*, p. 139). It could never mean that such a motion was to be determined solely upon the judge's own personal knowledge alone; in which case neither the counsel making nor resisting would know on what facts to argue, nor would the grounds of the decision appear. On an appeal, unless a statement was made by the judge before whom the motion was made, of what he considered to be facts in the case, the appeal would be nugatory, and the making of such statements would lead to unseemly contests between the bench and the bar as to what took place. I think, therefore, such motion cannot be made without some affidavits containing facts of the kind suggested in the case first cited, (People *v.* Central R. R., *ubi sup*) so that the grounds of the decision may appear on an appeal. In the present case nothing of the kind appears, it does not even appear by the papers before us, that a trial has been had or in

whose favor judgment has been rendered, or what disposition was made of the defendants counter-claim. After such counter-claim was made and replied to, the plaintiff could not discontinue without the defendant's consent (Cockle *v.* Underwood, 3 *Duer*, 676), nor could the defendant withdraw his counter-claim without the plaintiff's consent. If it was litigated and the defendant was defeated, it would be hard to charge the plaintiff with any part of the allowance for that branch of the litigation, and it would be equitable to take it into consideration in fixing the allowance to the defendants. In any event I think the order was made on insufficient papers, and should be reversed without costs on the merits with privilege to renew on other papers.

A separate motion was made to dismiss the appeal upon the ground that the order was not appealable; that motion must be denied with seven dollars costs to the plaintiff.

THIESSELIN *against* ROSSETT.

Referee's Report.—Extension of Time.

Where the parties to an action pending before a referee stipulate that he may take more time for making and filing his report than the sixty days prescribed by the statute, his report will not be set aside as made too late, because he exceeds the time mentioned in the stipulation.

When the parties have once waived, as by the provisions of the statute, they are enabled to do, the right to exact a report within the sixty days, there is nothing in the statute which declares that the report may be set aside or that any other particular consequence shall result from the failure of the referee to report within the extended time. If the parties surrender the right to require a report within sixty days, they cannot, by any stipulation, control the action of the referee.

What constitutes an act indicating the intention of a party to disaffirm the right of a referee to deliver a report after the expiration of the time prescribed therefor by law—considered.

Appeal from an order denying a motion to set aside the report of a referee.

This action was brought by John P. Theisselin against John D. D. Rossett; and was referred to a referee for trial.

The referee being unable to make his report within sixty days, as prescribed by the Code, obtained from defendant's attorneys a consent extending the time within which to report, until the 4th day of July, 1863, and subsequently another further extension until December, 1863. He failed to make his report within the time granted by the extension and the defendant and his attorney refused to grant any further time. On the 14th day of February, 1866, he made a report giving judgment against defendant. The defendant obtained an order to show cause why the report should not be set aside.

The motion was argued at April Term, 1866, before Judge CARDOZO, who denied it. The following opinion was delivered by him at Special Term.

CARDOZO, J.—I am inclined to the opinion that the report of the referee was regularly made.

The statute says that the report must be made "within sixty days from the time the action shall be finally submitted," unless the parties stipulate otherwise.

The parties in this case have stipulated otherwise.

They told the referee he need not report within the sixty days, by stipulating that he might take a certain other time, and although he exceeded the last mentioned period, I think the report should not be set aside.

The statute gives the parties the right to require that the referee shall report within sixty days, and it declares the consequences of his omission to do so. But when once the parties have waived the right to exact a report within the sixty days, by stipulating otherwise, there is nothing in the statute which declares that any consequence shall result from the referee exceeding the time they see fit to allot to him. The statute does not say that the parties may, by stipulation, extend the time, and that the report shall be made within the extended period. The parties may oblige a referee to report within the sixty days, but if they surrender the power which the statute gives them, by waiving that period, they cannot, by any stipulation as to time, control his action.

If, having been released from the limitation of sixty days prescribed by the statute, by the act of the attorney, the referee unreasonably delays to report, application must now, as before the Code, be made to the court to compel him to proceed to decide the case. For these reasons, I think the motion should be denied, but without costs.

From this decision the defendant now appealed.

F. R. Coudert, for appellant.

Geo. Carpenter, for respondent.

By the Court—BRADY, J.—In addition to what was said by Judge CARDOZO, at Special Term, when the order was made to which this appeal relates, it may be said that if the referee were not granted his "own time" to make and deliver his report, the defendant took no step indicating an intention to disaffirm the right of the referee to make and deliver his report, after the expiration of the period to which the defendant admits the time to have been extended. The refusal to enlarge the time on application is not such an affirmative act. The party intending to render the reference useless must do some act thereto on the cause as already suggested. (Mantles *v.* Wyle, 26 *How Pr. Rep.*, 409.) It sufficiently appears from the conduct of the defendant's attorney in asking an adjournment of the taxation of costs, that no act disclaiming the reference was done or intended, and it would be unjust to allow the objection to prevail against the vitality of the report. The right to make the objection was, under the circumstances, waived; as it might be (Mantles *v.* Wyle, *supra.*; Leitch *v.* Brotherson, 25 *How. Pr. Rep.*, 407), and the order made at Special Term should be affirmed with ten dollars costs.

CHASE *against* HOGAN.

New York Superior Court; General Term, February, 1867.

CONTRACTS.—SPECIFIC PERFORMANCE.—TIME WHEN ESSENTIAL.

The rule of Courts of Equity that in some cases time may be regarded as not of the essence of a contract, does not extend so far as to enable a party in default to obtain affirmative relief in equity, in a case where he shows neither any good reason for non-performance by the day named in the contract nor any peculiar equity.

The general rule applicable in this class of cases is, that time is a circumstance of decisive importance, but that it may be waived by the conduct of the parties; and that it is incumbent on a plaintiff who sues for a specific performance, either to show that he has used due diligence to perform the contract, on his part, by the day named, or, if not, that his negligence arose from some just cause, or has been acquiesced in.

In an action for the specific performance of a contract for the sale of land, it appeared that the plaintiff agreed with the defendant's testator for the purchase from him of the lot of land in question, upon which the vendor was to make the purchaser a building loan. The agreement provided that if the plaintiff should refuse or neglect to complete the building contracted for, or, if the diligent prosecution of the work thereon should at any time be suspended for ten days, the vendor should have the right to insist on immediate repayment of his advances and to sell, on ten days notice to the purchaser, all the purchaser's interest in the premises, and apply the proceeds, &c. Upon the completion of the building the vendor was to give the purchaser a deed of the lot, and the purchaser was to give back a mortgage for the price of the lot and the building loan. It further appeared that before the building was completed the purchaser suspended all work upon it, in consequence of which the vendor gave him notice that he would sell the interest of the purchaser in the contract under the power reserved, unless his advances were repaid; and a sale was accordingly made at public auction, no notice of time or place of sale being given to the purchaser, and the vendor buying in the property. In an action by the purchaser against the executors of the vendor, to compel a performance of the contract of sale and the delivery of the deed:

Held, 1. That the evidence adduced to show a reason for the purchaser's delay in completing the building was insufficient for that purpose and the purchaser was therefore not entitled to a specific performance, upon the ground that his own non-performance at the day was excused.

2. That the mere fact that if plaintiff was not relieved he would suffer a

loss of time and materials did not constitute a special equity such as would entitle him to relief within the rule above stated.

Wherever a court of equity declines, by reason of a default on the part of the plaintiff, to decree a specific performance of a contract in his favor, it will also decline to award him damages for the breach.

The provisions in the contract authorizing the vendor to resell for repayment of his advances were not obligatory upon him. It was optional with him to resort to a resale or to wait until the time limited for performance expired, and then, in case of non-performance, treat the contract as at an end, and resume possession of the property, disclaiming the right to resell.

The provisions of the contract reviewed with reference to this question, and their construction determined.

The former decision of this court in this case (7 *Bosw.*, 431), reviewed and explained.

Appeal from a judgment.

This action was brought by George K. Chase against Robert Hogan; and after the death of Hogan was continued against Roswell D. Hatch and others, executors of Hogan.

It was brought upon a contract between the plaintiff and Robert Hogan, dated September 18, 1856, by which Hogan agreed to sell, and the plaintiff to purchase a certain lot of land for $5,000, and plaintiff agreed to erect on said lot a house, which should be fully completed before May 1st, 1857. Hogan agreed to loan to Chase to aid in the erection of such house $2,500 in twelve installments, and upon the completion of said house to deliver to the plaintiff a warrantee deed of the lot, free from all taxes and assessments to the date of the agreement. The purchase money of the lot, and the sum to be advanced to and in the erection of the building was to be paid by said plaintiff to Hogan by his bond, secured by a mortgage on the premises, bearing even date with the agreement, and to be executed and delivered simultaneously with the deed. The bond and mortgage were to bear interest on the amount of the purchase money from the date of the contract, and on the advances from the dates on which they should be made.

The mortgage was to contain an insurance clause, by which the premises were to be kept insured in a sum of not less than $3,000.

After these provisions the contract contained the following clauses: "It is furthermore agreed that if said Chase refuse

" or neglect to complete said intended house, or if the diligent " prosecution of the work thereon shall at any time after the " date of these presents be suspended for ten days, then and " in such case said Hogan shall have the right to insist on the " immediate repayment of all the advances he may have " made, together with the interest thereon; and he is also " hereby authorized in such case to sell at public or private " sale, all the estate, right, title and interest of said Chase in " and to the said premises and apply the proceeds of such " sale to the payment and satisfaction of the expenses of such " sale, and of all claims and demands due thereon or after to " become due, which said Hogan may have against said Chase " for and on account of said premises, and if any surplus re- " mains the same is to be paid to said Chase. The said Hogan " is, however, to give said Chase ten days notice in writing of " his intention to make such sale."

The complaint set forth this contract and alleged that under it plaintiff went into possession of the premises, and during the fall of 1856 was proceeding to erect thereon the house called for by the contract, and had progressed to the fourth tier of beams when the winter weather rendered it unfit to proceed further until the ensuing spring; that he had expended in such erection $3,000; that in April, 1857, Hogan, pretending that the ten days suspension of diligent prosecution had elapsed, claimed to exercise acts of ownership over the property and expel the plaintiff from possession of the same, without in any lawful manner proceeding to change the relation of the parties in their existing rights; that the plaintiff had never refused, or in any manner neglected to proceed with the work, but in consequence of such expulsion from the premises by the defendant; that no proceedings at law or equity had been taken by either party to foreclose plaintiff's interest or divest him of his rights in said property, but that the buildings had ever since remained in that unfinished and unprotected state, by reason of defendant's conduct aforesaid: that the plaintiff was ready and willing to proceed, and he, the plaintiff, by his complaint offered to comply in all things with the requirements of said contract, on his part, except that which he claims to have been waived by defendant.

The prayer of the complaint was that the omission of the defendant to call on the plaintiff to execute an assignment of his interest in said contract may be declared a waiver of his right to do so in pursuance of any sale in consequence of such suspension of the work, and that said contract might be declared in full force and effect in the plaintiff, and that the plaintiff might be permitted to proceed with the execution of the same, or that plaintiff's interest in said contract might be sold under the direction of the court, and the proceeds appropriated under the direction of the court as should seem just, or for such other specific or general relief in the premises as to the court should seem just.

The answer denied that plaintiff expended towards the erection of the house, the sum mentioned in the complaint. It then alleged that plaintiff continued to erect the building until about February 23, 1857, and then wholly ceased to work thereon, and never afterward proceeded therewith, but wholly neglected and refused to proceed and complete the same, leaving the same partially unfinished; it then alleged that up to said February 23, 1858, defendant had advanced to plaintiff under the contract, $850; that about April 15, 1857, the plaintiff having suspended work for more than ten days, the defendant gave plaintiff written notice that he would sell at public auction in the city of New York all the right, title and interest of the plaintiff in said contract, if plaintiff did not before the expiration of ten days thereafter repay him all sums paid by defendant to plaintiff upon the contract, together with interest thereon, and all other charges thereon; that plaintiff still neglecting to go on with the building, defendant, after having given public notice thereof in the newspapers published in the city of New York, did sell at public auction, at the Merchants' Exchange in said city, on the 12th day of May, 1857, all the right, title and interest of plaintiff in the premises and the building partially erected thereon, and became the purchaser thereof himself for ten dollars, that after the sale all the right, etc., of plaintiff was wholly extinguished, and the defendant became the lawful owner. It denied all the allegations of the complaint inconsistent with the answer. It alleged that after the sale of the plaintiff's interest the defendant, being in

possession of the premises, and the contract still remaining un-performed by plaintiff, and before the commencement of this action, made with John B. Mee a contract in reference to the premises, similar in its provisions to the one made with plaintiff, and that Mee had proceeded under the contract to erect a dwelling-house on said lot of the value of from $12,000 to $15,000, and had nearly completed the same. It prayed that upon any recovery by plaintiff he should be adjudged only entitled to any amount unexpended before such sale of his interest in such contract, after deducting therefrom any and all advances by defendant, with interest thereon, and all other claims against the plaintiff by defendant under the contract, and that Mee remain in possession under the contract between him and defendant.

The cause was tried at Special Term as an equity case, before a single judge. On the conclusion of the testimony on both sides defendant moved for a dismissal of the complaint on the grounds:

1. No performance is shown by defendant.

2. No excuse for non-performance is shown.

The judge reserved his decision of the motion.

The counsel for defendant then requested the judge to find as follows:

1. That for more than ten days before the 17th day of April, 1857, the plaintiff had ceased the diligent prosecution of the work upon the said house. The court refused so to find, and the defendant excepted.

2. The defendant further requested the court to find a rule that after the first day of May, 1857, the defendant's testator was authorized to take quiet and peaceable possession of said property, and that the contract between himself and the plaintiff had been broken and rescinded by the default of the plaintiff to complete the said house.

The court refused so to find, and the defendant excepted.

3. That after the failure of the plaintiff to complete the said house in accordance with the terms of his contract, and by the time limited by the contract for such completion, the defendant's testator was not required by his contract to sell the said premises; or the right, title, interest or estate of the said

plaintiff therein at public auction in order to vest himself with full power and authority to possess, use and employ, or sell said premises, but was, at his own option, authorized to take hold and possess said premises, and enjoy the same as his sole property, provided he acquired possession of or entered upon the same for that purpose peaceably.

The court refused so to find or rule, and the defendant excepted.

4. That by reason of the plaintiff's violation of his contract, and the non-completion of the said house, the defendant's testator was justified in making the contract for the sale of the premises to John B. Mee, on the first day of June, 1858.

The court refused so to find or rule, and the defendant excepted.

5. That the plaintiff by reason of his non-performance of his contract had no right of action against the defendants or their testator in his lifetime.

The court refused so to find or rule, and the plaintiff excepted.

6. That an action for specific performance could not be turned into or treated as an action for the recovery of damages, and the plaintiffs were not entitled to recover damages in this action.

The court refused so to find or rule, and the defendant excepted.

Thereupon the court found as matters of fact:

1. That the agreement above set forth was entered into between the plaintiff and Robert Hogan, about the 18th September, 1856.

2. That thereupon plaintiff entered into possession of the premises, and commenced the erection of a dwelling-house in conformity with said agreement, and continued his work until the latter part of February, 1857, when he suspended the work and did not resume the same.

3. That on the 17th April, 1857, Hogan served on Chase a notice dated April 15, 1857, that after ten day's from the date thereof he should sell at public auction all the estate, right, title and interest of him, said Chase, in the contract, unless he, said Chase, should before the expiration of said ten days re-

pay and reimburse him, said Hogan, for all the money he had paid out on the contract, together with interest and other charges incurred.

4. That after the service of this notice on Chase, said Hogan caused a notice that he would sell, at the Merchants' Exchange, at 12 o'clock on Tuesday, May 12, 1857, all the estate, etc., of said Chase in said premises, to be published in the "Evening Post," on the 5th, 6th, 7th, 8th, 9th, 10th and 11th days of May, 1857; and in the "Morning Courier and New York Enquirer," on the 6th to the 12th days of May, 1857, both inclusive.

5. That no notice of the time and place of sale was given to the plaintiff, and he had no knowledge thereof.

6. That on the 12th of May, 1857, at the time and place specified in said notice mentioned in above 4th finding, all of the estate, etc., of said Chase, in said premises, was put up at auction, for sale, by E. H. Ludlow, auctioneer, and struck down to Hogan for ten dollars, he being the highest bidder.

7. That the plaintiff violated his contract with defendant by the total suspension of all work on said house, and by the non-completion of said house on the first of May, 1857.

8. That on the first of June, 1858, prior to the commencement of this action, Hogan made with one John B. Mee a contract in reference to said premises similar in its provisions with that made by him with plaintiff, under which agreement said Mee entered into possession of said premises, and proceeded to fulfil the contract on his part, and since the commencement of the action had received a deed of said premises.

9. That the value of said premises, with the building thereon, in the condition it was when the sale was made to said Mee, was $7,900.

10. That the price agreed to be paid by plaintiff under his contract with Hogan, with interest thereon to June 1, 1858, was $5,595 97, and the amount of advances made to plaintiff by Hogan, with interest thereon from the time they were made up to said June 1, 1858, was $936 26, the two sums together making $6,532 23, and leaving a balance when deducted from the value of the premises at the time of the sale to said Mee, of $1,367 77.

The court found as matters of law upon the above found facts:

1. That the plaintiff was not entitled to judgment for specific performance.

2. By the public auction sale, Hogan acquired no right, and the plaintiff was not divested of his right, title, interest or estate in said premises.

3. By the private sale to said Mee, the plaintiff was not divested of his estate, etc., in said premises.

4. Substantially the plaintiff was entitled to be credited with the aforesaid sum of - - - - $7,900 00
And was chargeable with the aforesaid sum of 6,532 23

And that he was entitled to recover of defendants the sum of - - - - - - $1,367 77

with interest thereon from December 28, 1864, the date of the report of the referee, to whom it was referred to take and state the accounts, etc., amounting in the aggregate to $1,456 33, for which amount, with costs to be adjusted, the court directed judgment in favor of the plaintiff against the defendant.

Judgment was entered accordingly, from which judgment this appeal was taken. It was not found that there was any excuse or justification for the non-performance. The plaintiff's evidence, however, indicated that he relied on two matters as affording an answer and justification, viz., the state of the weather and his illness.

E. P. Cowles, for the appellants.

C. A. Davison, for the respondent.

*By the Court**—JONES, J.—It will be perceived that one of the findings by the court below is, "That about 18th September, 1856, plaintiff entered upon the possession of the premises mentioned in the complaint and commenced the erection of a dwelling-house thereon in conformity with said agreement, and continued his work thereon until about the latter part of February, 1857, when he suspended such work and did not resume the same;" and another finding is, that plaintiff violated his

* Present—MONELL, GARVIN and JONES, J.J.

contract with defendants' testator by the total suspension of all work, and by the non-completion of said house, on the first of May, 1857, the day limited by the contract for its completion.

The question then arises, What is the effect of this breach of contract by plaintiff?

At common law (under the cases of Champlin *v.* Rowley, 18 *Wend.*, 193; Harmon *v.* Bingham, 12 *N. Y.*, 99; Smith *v.* Brady, 17 *N. Y.*, 173; Tompkins *v.* Dudley, 25 *N. Y.*, 172; Culter *v.* Tobias, 26 *N. Y.*, 217), the plaintiff was guilty of a breach of his contract, and having failed to fully perform the condition precedent to his right to receive the deed, by omitting to erect the building by the day limited, he could neither bring an action for damages based on the defendant's refusal to deliver the deed, nor an action on a *quantum meruit* for the work actually performed and the materials actually furnished; but on the contrary defendants (under the authority of Jackson *v.* Moncrief, 5 *Wend.*, 26; Wright *v.* Moore, 21 *Wend.*, 230), could at law bring an action of ejectment to recover possession of the property. Defendants having peaceably obtained possession, there is no necessity for them to bring the possessory action of ejectment. The remedy of the plaintiff, if he has any, is in equity. (Wright *v.* Moore, 21 *Wend.*, 230).

The plaintiff has in fact brought an action in equity to obtain, preserve and protect such rights and interests as he claims to have.

He claims that in equity there is a principle to the effect that time is not an essential part of a contract; that in this case time would not in equity be regarded as of the essence of the contract, and consequently although he has not performed by the time limited, he is yet entitled to relief in equity.

It is true it is stated in many English and American cases that in a contract for the sale and purchase of land, the time limited for the completion of the sale and purchase is not in general regarded in equity as an essential part of the contract. I do not, however, understand this doctrine to extend so far as to enable a party to obtain relief against non-performance by the day in cases where he shows neither any good reason for such non-performance, nor any peculiar equity.

Chancellor KENT, in Benedict *v.* Lynch (1 *Johns. Ch.*, 370) cited

from pages 375, 376, 379), observes: "It may then be laid down as an acknowledged rule in courts of equity, that where the party who applies for a specific performance, has omitted to execute his part of the contract by the time appointed, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The notion that a party may be utterly regardless of his stipulated payments, and that a court of chancery will almost at any time relieve him from the penalty of his gross negligence is very injurious to good morals, to a lively sense of obligation to the sanctity of contracts, and to the character of this court. It would be against all my impressions of equity to help those who show no equitable title to relief."

He then, after remarking that it was formerly supposed that the time fixed on for the completion of the contract was quite immaterial, proceeds to review the cases, and after such review observes: "From the review which I have taken of the cases, "the general principle appears to be perfectly established that "time is a circumstance of decisive importance in these con- "tracts, but it may be waived by the conduct of the parties; "that it is incumbent on the plaintiff calling for a specific per- "formance to shew that he has used due diligence, or if not, "that his negligence arose from some just cause, or has been "acquiesced in."

There is no case, not even those where it is insisted that time is not of the escence of the contract which does not require the plaintiff to show at least this much, to entitle himself to relief.

In the case at bar the plaintiff does not bring himself within these principles.

The court below has not found as a fact, nor does the testimony satisfactorily show, that there was any excuse for the delay, nor does there appear to be any specific equity.

It is true the plaintiff swears he was sick from 5th or 6th April till after May 1st. This, however, could not excuse the suspension of the work from the latter part of February to the 5th of April, a period of six or seven weeks. *Non constat*, but

that if he had prosecuted the work diligently during that period, he would have finished the work before he was taken sick. Nor does it appear how sick he was; he may not have been so sick as to prevent him from finishing the house through the agency of others; he does not swear he was, and he does not testify that his sickness prevented him from completing. All this is left to be inferred from the bare fact that he was sick. I think the fact does not justify the inference.

It is also true that the plaintiff testifies that he proceeded as fast as the weather would permit, and with as many men as could work there to advantage, considering the weather, up to the time he was taken sick. At folio 111, he testifies that he was going on with the work all the time except when the weather prevented, from the 29th of March to April 6.

As I understand this testimony, he says that he went on with the work up to the 29th March, and that it was only from the 29th March to April 6th, that the weather prevented its prosecution.

The court below found that he absolutely ceased work in the latter part of February, a month prior to March 29th. This finding is in direct conflict with the plaintiff's testimony at folios 111 and 130.

With the discredit cast by this finding on plaintiff's testimony on this material point, the court on appeal should attach but slight importance to the evidence of sickness.

The testimony at folio 111, seems to me to disprove the excuse arising from the weather.

That testimony shews that the only delay caused by the weather was eight days from March 29 to April 6. Thus there is over a month of total suspension left unaccounted for. This unexcused delay of one month leads to the conclusion that the assigned causes, of weather and sickness, did not prevent the performance, but that some motive, which was not disclosed, led to the non-performance, and that the weather and sickness were first thought of when this action was commenced.

Upon the evidence, if the case were tried before me, I should feel very unwilling to find that non-performance by the day was prevented either by the weather or the sickness, or both

combined. Feeling thus, I cannot, on this appeal, find such to be fact for the purpose of sustaining the judgment below when the judge below has not chosen to base his decision on the assumption of the existence of such fact.

It is also true that if plaintiff is not relieved he will suffer a loss of time and materials. That bare fact, however, constitutes no special equity—it is common to all cases. As the case at present stands, this loss appears to be the result of plaintiff's own culpable negligence, and he cannot call on equity to relieve him from it. Besides it does not appear that the value of the time and materials is more than sufficient to reimburse defendant for his advances, interest thereon, and interest on the purchase money.

For these reasons, it would be improper for the court to compel a specific performance. The same reasons would also debar the plaintiff from recovering damages in a court of equity. If, by reason of his default, the court declines to decree specific performance, it will also decline to award damages.

Thus, neither under the principles of the common law, nor those of equity, is the plaintiff, as the case now stands, entitled to any damages, unless the clauses which in the above statement of the case are extracted, *haec verba*, from the contract, have the effect of depriving defendant of the rights which he would otherwise acquire by reason of non-performance by the day.

I think those clauses have not such an effect. The tenor of them seem to be to enable the defendant to press forward the work in case of delay during the running of the contract; and also in case of an abandonment or refusal to proceed during the running of the contract, to provide a means by which defendant instead of waiting for the contract to expire by limitation, may obtain repayment of his advances, with interest, and terminate the contract.

These clauses give to defendant rights which he otherwise would not possess.

They were inserted for the benefit and protection of Hogan not of Chase. They gave Hogan the right, if he saw fit to exercise

it, to terminate the contract in a certain manner prior to its expiration. There is nothing, however, compelling him to exercise that right. It was entirely optional with him. He might wait until the time limited for performance expired, and then, in case of non-performance, treat the contract as at an end, and resume possession of the property, saying, "I do not desire to exercise the right given me by the clauses for my benefit and protection."

A review of all of the provisions of the contract shows this to be the proper construction of those clauses.

Defendant was to sell the land and make advances; to give a deed on the completion of the house; and to take back a mortgage for the purchase money, the advances and interest thereon; the contract provides that the house should be completed prior to the first of May, and that the deed and mortgage should be delivered on the completion of the house.

It is evident that defendant had a great interest in having the house completed as soon as possible, for it was on the mortgage on that that he relied for his security for the purchase money of the land and for his advances; and also, that he might derive some means whereby he might readily avoid making further advances and recover back those already made in case the house did not progress satisfactorily.

Under these circumstances defendant may well have said to Chase, "I wish some provision inserted whereby I may, if you are dilatory, spur you up so as to get the house completed as much before May 1st as possible, and so that if you at any time before May 1st, abandon or refuse to go on with the contract, I may readily get back my advances and get rid of you;" and Chase may well have replied to this, "Very well; I see no harm in this; I have contracted to finish the house before the first of May, and expect to do so, therefore, such provisions cannot, as I see, hurt me." Thereupon these provisions were agreed on and inserted. But to proceed a little further, Chase contracted to finish the building by May 1st. It is fair to presume that he intended and anticipated to be certainly able to comply with the contract. There is nothing in the contract which suggests that Chase had in his mind the possibility of being prevented from complying by any casualty; therefore,

the provisions in question could not have been inserted for his benefit or protection in this respect.

Again the provisions could not have been inserted with the view of benefitting or protecting plaintiff in event of his non-performance by the day, either negligently or wilfully. It cannot be conceived that defendant would consent to such a permission or negligence or willfulness; besides it is contrary to the spirit of the provisions.

Thus the whole context of the contract, as well as the peculiar wording of the provisions, leads irresistibly to the conclusion that the sole effect of the clauses is to invest the defendant for his sole benefit and protection with certain rights which he might or might not at his option exercise during the running of the contract; that this is their only object, and that it was so understood and intended by both parties when the contract was made.

It follows as a necessary consequence that these clauses have (if they have not been effectively exercised before the first May) no effect whatever on the legal rights and remedies of either party arising from a non-performance by the day.

The following questions, viz.:

1. Whether a court of equity will require stronger grounds to induce its interference to relieve from the consequences of non-performance by the day, in cases where it considers time to be of the essence of the contract than in cases where it considers time not to be of the essence.

2. As to whether in the contract in question, time is of the the essence or not.

3. As to whether a delay of one year in bringing suit would not be regarded as such an acquiescence, as that the court would grant no relief, even in cases where time was not of the essence.

4. As to whether, under a proper construction of all the decisions, time is not always of the essence.

5. As to whether a court of equity can in *any case* decree damages except in lieu of a specific performance, which it decrees the plaintiff entitled to, but which cannot be enforced in consequence of the defendants inability to perform.

6. And as to whether, where the defendant's inability to per-

form arises before the commencement of the action, the court can *in any case* decree damages in lieu of a specific performance, which it deems the plaintiff would have been entitled to, had it not been for such inability of defendants—have not been considered or determined.

It is unnecessary to consider the 1st, 2d and 4th queries since the conclusions have been arrived at, that even under the equity principles applicable to contracts where time is not of the essence, the judgment cannot be sustained on the facts found, nor on those facts with other uncontroverted facts in the case.

It is also unnecessary to determine the 5th and 6th queries, since the case as presented is not one in which damages can be awarded. On a new trial a case may possibly be made which will raise these questions. It will be more proper to determine them then than now.

The third query is more properly a matter of evidence. Answering it in the negative would not entitle the plaintiff to hold his judgment, since it is reversed on considerations entirely disconnected with this one. An affirmative answer, on the other hand, would not only call for a reversal of this judgment, but a rendition of judgment absolutely for defendant.

It is a matter which undoubtedly would have a great bearing on the question whether any relief should be granted. Its force, however, may be strengthened or weakened by other matters; thus if at the time of the suspension of the work the market was such that plaintiff anticipated a loss on the contract, that would account for the suspension, and if at the time of commencing the suit the market had so improved as to render a profit certain to arise from completion, that would account for the suit. Under these circumstances the year's delay would probably be an absolute bar (under the cases of Rogers *v.* Saunders, 16 *Maine*, 92, 99, 100 · Alley *v.* Deschamps, 13 *Vesey*, 228); on the other hand its effect may, by circumstances to be proved, be either greatly weakened or wholly destroyed. I do not, therefore, think it advisable to determine its effect on this appeal.

A few words respecting the decision made by a former general term of this court in this case.

That decision was rendered on an appeal taken from a judgment entered on a decision made upon a former trial. The judge before whom that former trial was had, held, that the parties by the special provisions before alluded to had prescribed the mode in which the plaintiff's interest was to be foreclosed in case of default, and that defendant had not properly pursued that mode in that he had become the purchaser at the sale made under these provisions. He therefore held that such purchase could not be allowed to foreclose the plaintiff from a right to an account, and consequently directed an account. His findings of fact upon which he rendered this decision were substantially the same as those before us on this appeal.

There does not however appear to have been any evidence tending to show any excuse for the non-performance, and there was a finding that Chase had furnished materials and performed labor to the amount of $5,040 88. These constituted the only differences between the case as then and as now presented to the appellate court.

The appeal taken from the judgment entered upon such former special term decision was heard before two judges only. One of the judges held that as the plaintiff had shown no excuse for the non-performance, he could not recover damages at law, nor could he obtain either a specific performance or damage in equity; he also held the special provisions and the acts done thereunder could have no bearing whatever in the determination of the rights of the parties. He also held that while plaintiff was not entitled to recover anything, defendant was entitled to recover damages against plaintiff for non-performance. He also held that if the action could be maintained in any shape the defendant should be allowed in diminution of plaintiff's claim for the damage to the building by the weather; he therefore decide that the judgment should be reversed and a new trial had.

The other judge, without considering the case in the aspect in which his associate had considered it, proceeded to discuss the point whether the defendant could rightfully purchase at the sale made by him, and then without coming to any conclusion on this point states that the principle on which the ac-

count was taken below was erroneous for the reason that no allowance was made for the damages sustained by the building by exposure to the elements intermediate, the time when the plaintiff abandoned the work and the time of the subsequent sale of the premises. He then lays down what he regards as the true principle, and decides (but his opinion furnishes no clue to the ground on which he bases the decision) that if, on an account taken on such principle a balance should be in favor of plaintiff, Hogan should pay that balance; but if the balance should be in favor of Hogan, he should have judgment for it.

On the ground, then, that the principle of the account, as taken in the court below, was erroneous, that the plaintiff was entitled to an account to be taken on certain other principles, and that the party in whose favor the balance should be found to be on such new accounting was entitled to judgment against the other; he concurred in reversing the judgment below and granting a new trial.

It is apparent that on that appeal nothing was decided except that assuming this action could be maintained in any shape the defendant should be allowed for the damages to the building by the weather. It may then be regarded as the law of this case that defendant is entitled to such allowance if the plaintiff can maintain this action in any shape. But the decision settles no other point, particularly not the question as to whether the plaintiff had any right of action either legal or equitable; as the judges did not agree on this point, one of them holding that plaintiff had no right of action whatever, and the other holding he had a right of action in equity for an account, and for the payment of the balance found due him on such account.

The result from the above views is, that the judgment must be reversed, and a new trial ordered, for the reason that plaintiff to entitle himself to any recovery must show at least a sufficient excuse or reason for his non-performance.

It is not, however, intended to be decided that if he succeeds in shewing a sufficient excuse, he will be entitled to recovery. Whether showing a sufficient excuse will give him a *prima facie* cause of action or not, and whether if it does, it may not be

overcome by other facts and circumstances, are questions which had better be reserved until they come before us in a case the judgment wherein is founded on such excuse, or such other facts and circumstances.

Judgment reversed, and new trial ordered, with costs of appeal to appellant to abide the event.

McMAHON *against* ALLEN.

Court of Appeals; January, 1867.

PARTIES.—ACTION BY ASSIGNEE.—FRAUDULENT CONVEYANCE.

An action may be maintained by a grantee or assignee of property, in his own name, to set aside a prior conveyance or assignment of the same property, by the former owner, alleged to be void as having been procured from the former owner by fraud.

Appeal from a judgment of the General Term of the Supreme Court, in the First Judicial District, reversing a judgment entered upon the report of a referee.

This action was brought by Dennis McMahon, assignee of Charles T. Harrison, against Thomas C. Allen, to set aside a conveyance of property made by Harrison, the plaintiff's assignor, to the defendant, upon the ground that it was procured by the defendant, from Harrison, by means of fraud.

The action being referred to a referee for trial, he made his report that the fraud alleged was proved, and that the conveyance ought to be set aside. From the judgment entered upon this report the defendant appealed to the General Term, where it was held that the judgment must be reversed, on the ground that an action to vacate a conveyance for fraud practised upon the grantor cannot be maintained by an assignee.

From this judgment the plaintiff now appealed.

D. McMahon, appellant, in person.

Albert Matthews, for the respondent.

HUNT, J.—On the 22d of March, 1852, Charles T. Harrison was the owner of a life estate in No. 694 Houston Street, New York, as tenant in common with his brother Samuel. At the same time the defendant was indebted to the said Charles in the sum of $500, for moneys received by him belonging to said Charles, from the surplus of the sale of No. 14 Charles Street, and for rents of said premises in Houston and Charles Streets, collected by defendant while assuming to act as agent for the said Charles T. The said Charles also had an interest in certain trusts under his mother's will, which, under some circumstances, might be of value. He was at this time a mariner, had been such for seven years previously, was reckless, improvident, unacquainted with business as transacted on land, easily led and persuaded to do foolish things, was needy and in want. At and before the time mentioned, the defendant stood in a fiduciary relation to said Charles, from having acted as his agent in collecting the rents and surplus interest, as above mentioned, and had also been the agent of the executor of his mother's estate, who was also trustee of personal property directed to be invested for the benefit of Charles T. and his brother Samuel.

On the day mentioned, the defendant, by unjust and inequitable means, obtained from the said Charles T. Harrison a conveyance of all the lands, tenements, claims, demands, bonds and money belonging to him as devisee, legatee or appointee of his mother, or as one of her heirs-at-law, describing particularly certain interests and certain lands.

Charles T. Harrison was then ignorant of business, and of the value and situation of his property, unacquainted with the state of accounts between himself and the defendant, unable himself to investigate them, and had no counsel to advise or assist him. The defendant knew all these facts, knew him to be reckless, improvident and dissipated, and did not disclose to him the state of his affairs, but concealed them, and drew him into making the above conveyance, the consideration of which

was grossly inadequate; and the defendant's conduct in obtaining the deed was inequitable and fraudulent. The actual value of the estate so conveyed was at least $2,300, and under some contingencies, it would have been more valuable. The amount paid by the defendant to said Charles T. was abount $1,100, of which $700 was in money, $150 in a gold watch, and $250 was paid to the defendant's counsel, for which the said Charles T. received no benefit whatever. At the time of the said conveyance Charles T. was indebted to the amount of $600, and his creditors are prejudiced by the conveyance aforesaid.

On the 3d of August, 1852, the said Charles T. Harrison made an assignment to the plaintiff for the benefit of creditors of all his property and rights of action, with full power to sue for and collect the same.

On the 3d of September, 1852, the defendant, by further fraud and imposition, obtained from the said Charles T. a writing attempting to revoke the above assignment to the plaintiff.

The facts stated are as found by the referee in his report, and there is evidence to sustain them. They are not interfered with by the supreme court in the judgment given by it, and are obligatory upon us. We are not at liberty to weigh the evidence to determine whether we should have reached the same conclusion. (Code, § 272).

Upon the above facts the referee directed the setting aside of the conveyance to the defendant of March 22, 1852; and that an accounting be had by said defendant of the moneys, rents and interests received by him; and judgment was entered upon his report in favor of the plaintiff, with costs.

The defendant appealed from this judgment to the General Term of the First District, where the judgment of the referee was reversed on the sole ground, as stated in the opinion, that the cause of action could not be transferred by Harrison, so that an action could be maintained upon it in the name of the plaintiff.

A transfer of property, real and personal, is obtained fraudulently and inequitably by false representations made by the transferee to the transferrer, by abuse of a fiduciary relationship, by practice upon a reckless and improvident sailor. The

transferrer makes a subsequent conveyance of all his property and causes of action to the plaintiff, for the benefit of his creditors. Can the plaintiff maintain an action in his own name against the first transferee to set aside the conveyance to him, as having been fraudulently and inequitably obtained, and by an abuse of a fiduciary relationship?

In the recent case of Dickinson *v.* Burrell, this precise question was presented. (See the "Law Reports," Equity series, 1866, Part III., March, page 337.) James Dickinson and others made a conveyance of their respective shares of the real estate of George Whitebeard, deceased, to John Edens, which was liable to be set aside on the equitable grounds, viz.: that Edens was acting as solicitor for Dickinson in relation to the Whitebeard estate; that the consideration was inadequate; that Dickinson was in indigent circumstances and ignorant of the value of property conveyed. Dickinson subsequently made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain twenty-one years of age, or, being daughters, should marry, in equal shares. The bill was filed by five of Mr. Dickinson's infant children, to set aside the conveyance to Edens as to their portion of the estate. The other three children, the trustees of the settlement, and Edens, were the defendants in the suit. Mr. Dickinson was not a party. Edens demurred to the bill for want of equity. Mr. Selwyn, Q. C., Mr. Jessel, Q. C., and Mr. Hemmings, in support of the demurrer, claimed that the plaintiff could not institute the suit, arguing that at the time of making the voluntary settlement Mr. Dickinson had parted with all his interest in the property for a valuable consideration, and that the settlements therefore conveyed nothing but the right of suit to set aside the previous conveyance, which was contrary to public policy, on the ground of champerty, and not to be supported in equity. They further argued that if a *bona fide* conveyance would authorize the suit, it was otherwise with a voluntary settlement, which the settler could at any time avoid by a subsequent conveyance for value. Mr. Southgate, Q. C., and Mr. Webb, in support of the bill argued that there was no rule in equity prohibiting the sale of

property which the assignor was entitled to recover by suit; that the right of suit was incidental to the right of property, and did not affect the right to assign it. The demurrer was overruled with costs.

Lord Romilly, M. R., deciding the case, said: "Upon the allegations contained in the bill, I am of the opinion that a case is made out upon which, if proved as there stated, this court would give relief at the instance of the proper persons. The only question, therefore, that I have to determine is, whether by reason of the deed of April, 1864, the plaintiffs have a right to ask for that relief when their father, the settlor, and the trustees of the settlement have refused or decline to concur in asking for such relief." He proceeds—"Assuming the deed of April, 1864, to have been executed for value, then the right of suing is incidental to the conveyance of the property, and passed with it. That is, if James Dickinson had thought fit, after the sale to Edens in 1860, to sell the same property to A B, saying that the previous sale was a fraudulent one, and though he himself would not take any steps to set it aside, if A B thought fit to do so, he might, and that he would sell his interest in the property to A B for a sum of money then *bona fide* agreed upon, in such a case, in my opinion A B could have maintained the suit. The distinction is this: if Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying his interest in the property which is the subject of that indenture that would not have enabled the grantee, A B, to maintain this bill, but if A B had bought the whole interest of James Dickinson in the property then it would. The right of suit is incidental to the property conveyed, nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but is incidental to each interest carved out of it."

He then proceeds to consider the point that the conveyance was voluntary, and whether that fact alters or affects this right to sue, and says: "I am of the opinion that it does not. * * * Assuming a voluntary deed to be complete, *bona fide* and valid, and unaffected by a statutory disability, I know of no distinction between such a deed and one executed for valuable consideration. The estates and limitations

created in such a deed have the same operation and effect as in a deed executed for value, and must be construed in the same manner, and it carries with it all the same incidents and rights attached to the property conveyed as are carried by a deed executed for value, and the grantee in this respect stands in exactly the same situation as if he had paid value for the property conveyed.

This was a well-considered case, is of high authority, and, in my opinion, is an accurate exposition of the law. I think it should control the present case.

The Oneida Bank *v.* The Ontario Bank (21 *N. Y. R.*, 490, 498; and, Tracy *v.* Talmage, 14 *N. Y.*, 192), were cases similar in principle to the present. In the former case the Ontario Bank had issued certain post-dated drafts, which were held to be within the prohibition of the statute against bills or notes not payable on demand. Assuming such drafts to be void, it was held that the party who received them upon a loan of money to the bank was entitled to the money advanced by him, either upon the basis of a contract of loan, treating them as valid and rejecting the illegal security, or, upon a disaffirmance of the contract, as for money had and received. It was further held that the discount of such drafts, by the Oneida Bank, for Perry the original lender, and the transfer of the same, by him, to the Oneida Bank the plaintiff, gave to such transferee the same rights of action against the Ontario Bank that Perry had. The Court say—"He who sells a security and receives his pay for it, necessarily sells whatever claim or right the security is understood by the parties to represent."

In Tracy *v.* Talmage the Morris Canal and Banking Company had received certain post-notes which were held to be void. The Morris Company transferred $196,000 of such notes to the State of Indiana. The consideration for the post-notes was certain State stocks delivered to the Banking Association issuing the same, and the question, among others, was whether the State of Indiana was entitled to recover that consideration, the notes being considered void. There was no pretence that anything except the notes had been transferred in form, but it was held that the State was in equity the assignee of the de-

mand which the notes professed to represent, and was entitled to recover the value of the stocks. (See 21 *N. Y.*, 499).

In Waldron *v.* Willard (17 *N. Y.*, 466), the firm of Bourn & Co. executed to the plaintiff a writing that "we have this day sold to M. R. Waldron all our interest in the goods sunk by the boat 'Wyoming,'" with certain other particulars. It appeared that in the April preceding Bourn & Co. had shipped the goods in question by the defendants' boats on the Hudson river, that the boat was sunk, and after being fifty-five days under the water, it was raised, the goods on board were taken out, and sold for the benefit of the line. These facts were known to both parties to the bill of sale. It was held by this court that the above sale operated as a valid assignment of the rights of action against the carrier for the non-delivery of the goods.

The case of Prosser *v.* Edmonds (1 *Young & C.*, 481, &c.), is cited as an authority in opposition to the doctrine. I have stated I do not understand the question at issue to have been involved in that case, or that it was intended to have been decided by Lord Abinger. He says that when a party assigns his whole estate, and afterward makes an assignment of the same estate generally to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor making no complaint of fraud, the right of the second assignee to make such a claim would be a question deserving of great consideration. He expresses his present impressions as against the right, and illustrates his idea by suppositions which are at variance with the principles established in the cases in our courts. Lord Romilly says in Dickinson *v.* Burrell, *supra*, "that the case before us does not fall within the rule established by that decision of Prosser *v.* Edmonds. Nor is this case in principle like that of Nicoll *v.* The New York and Erie Railroad Company (2 *Kern.*, 121). The decision there was that when land was conveyed with a condition subsequent a mere failure to perform the condition does not divest the title, but there must be an entry, or what is equivalent by statute, by the grantee or his heirs, and that this right of entry did not pass by a conveyance of the land. This was the express ground that the conditions subsequent were

reserved for the benefit of the grantor and his heirs solely, and that no other person could take advantage of the breach. Of a similar character are the usury cases sometimes cited, which hold that the defence is a personal one, and that none but the borrower technically, or his personal representatives, can set up the defence.

In regard to the effect of an adverse holding by the defendant at the time of the execution of the assignment, the case of Dickinson *v.* Burrell, as well as that of Livingston *v.* The Peru Iron Company (9 *Wend.*, 511), shows that such defence is not available where the holding is under a deed fraudulently obtained. In the latter case it appeared that Livingston made a voluntary conveyance to his sons of a large tract of land in Clinton county. The sons filed a bill against the defendants alleging that their purchase was obtained by fraudulent misrepresentations as to the character and value of the land. The defendants demurred on the ground that they were in possession of the land at the time of his conveyance by Livingston to his sons by virtue of the deed under which they claimed. The court of errors held against the demurrer, deciding that possession under a deed fraudulently obtained could not be deemed adverse, so as to avoid the deed of the plaintiff.

The court below, in my opinion, were in error in holding that the assignment to the plaintiff did not authorize the suit brought by him in his own name.

The evidence of abuse of the confidence arising from a *fiduciary* relation brought the case within the principle of Tate *v.* Williamson (1 *Law Reports, Equity Series*, p. 528), which was shortly this: "a nephew of a former trustee of B's property being commissioned by his uncle to advise B, a young man aged 23, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to £1,000, and to advance him £500 for the purpose, offered to give him £7,000 for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years. Pending the negotiation, A obtained from C, a mining engineer, an estimate putting the value of the minerals under the entire estate at £22,000. A separate solicitor was employed for B at A's suggestion, and before completing

the bargain A urged B to consult his father (with whom he was not upon good terms). A did not communicate to B the valuation of the engineer, nor did he suggest to him to consult a mineral engineer. B accepted A's offer of £7,000, and died shortly after executing the conveyance. On bill by B's administrator to set aside the purchase, *Held* that such a fiduciary relation existed, that the suppression from B of the engineer's valuation rendered it impossible for the courts to sustain A's purchase. Sir A. Page, V.-C., says: "the broad principle on which the court acts in cases of this description is that whenever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. * * * The young man having then said that he was determined to dispose of his property, it was absolutely impossible for Robert Williamson, filling, as he did, that position of confidential adviser, to enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value."

The judgment of the general term should be reversed, and that of the referee affirmed with costs.

Judgment reversed.

ERNST *against* THE HUDSON RIVER RAILROAD CO.

Court of Appeals; June, 1866.

NON-SUIT.—WHEN ORDERED IN ACTIONS FOR NEGLIGENCE.—EVIDENCE.

In determining the propriety of a non-suit the appellate court should assume the truth of the facts which the testimony offered on behalf of plaintiff

legitimately conduces to prove, notwithstanding their truth is controverted by the defendant's witnesses.

In ordinary actions for damages for negligence the question whether the plaintiff was free from negligence, is a question of fact to be determined by the jury, under appropriate instructions, and subject to the revisory power of the courts. It is only where the proof of misconduct on the part of the plaintiff is clear and decisive that the court is authorized to grant a nonsuit.

In an action against a railroad company for damages sustained by collision with a vehicle at a railroad crossing, it appeared that on the occasion of the accident the signals usually given by the company's agents, of the approach of a train, were omitted, and that the injured person approached and attempted to cross the track without knowledge that a train was approaching. *Held*, that it was error to non-suit the plaintiff. The questions whether the omission of the signals was not negligence, and whether the plaintiff took reasonable precautions under the circumstances, ought to have been submitted to the jury.

Appeal from a judgment of the General Term of the Supreme Court, in the Third Judicial District.

This action was brought by Martha Ernst, the widow and executrix of Henry Ernst, against the Hudson River Railroad Company, to recover damages for the death of Henry Ernst, her husband, who was run over by a train upon the defendant's road, at the village of Bath, on December 29, 1855.

The action has been some time in litigation. It was commenced in 1856, and was first brought to trial in 1859, before Justice GOULD; at which time the complaint was dismissed. Upon appeal to the General Term, a new trial was granted. (See report, 32 *Barb.*, 159).

Upon a second trial before Justice HOGEBOOM, the plaintiff recovered a verdict for $2,500. Upon appeal, this judgment was affirmed by the General Term, but on appeal from that judgment to the court of appeals, it was reversed, and a new trial ordered. (See report, 24 *How. Pr.*, 97).

Upon a third trial before Justice MILLER, in November, 1865, the complaint was dismissed, and on appeal from the judgment to the General Term, it was affirmed, and from that judgment of affirmance the plaintiff now appealed.*

* We are informed that since the decision of the court of appeals, reported in the text, granting a new trial, the cause was brought to trial in May, 1867, for the fourth time; and resulted in a verdict for the plaintiff for $5,000.

The general facts out of which the cause of action arose was as follows: Henry Ernst, to recover for whose death the action was brought, was a teamster by vocation, residing at Sand Lake, in the county of Rensselaer, about fifteen miles from Albany. On the day of the accident, December 29, 1855. he left home to come to Albany, driving a two-horse sleigh, He reached the village of Bath, between 9 and 10 o'clock in the morning, where he was to take a ferry-boat plying between Bath and Albany. While waiting for the ferry-boat, he stopped in front of a hotel about 112½ feet east from the centre of the track of the defendants' road. When the boat was ready to start, he crossed the track in his sleigh to drive on board the boat. Just as he reached the point where the defendants' track crossed the highway an engine and train of cars going south struck the sleigh, and Ernst received injuries in the collision from which he died two days afterwards.

The questions controverted in the cause related chiefly to the sufficiency of evidence adduced by the plaintiff, to show that the collision was due to negligence on the part of the managers of defendants' cars, chiefly in the omission to give suitable notice by whistle, bell, &c., of the approach of the train to the highway; and to the sufficiency of evidence adduced by the defendants to show that Ernst was chargeable with negligence in driving upon the track without sufficient examination to ascertain whether a train might not be approaching at the time. Many details of the evidence are stated in the opinions of the court.

At the close of the testimony the counsel for the defendants moved for a non-suit, on the ground that the evidence did not establish negligence on the part of the defendants, and on the further ground that the evidence showed that the deceased was guilty of negligence contributing to the injury complained of. This motion was opposed by the plaintiff's counsel, who requested the court to submit to the jury the questions of fact involved, and particularly the following:

1. Whether the injury, on account of which the action was brought, was occasioned by the negligence of the defendant, or their agents, or servants.

2. Whether the deceased was guilty of any negligence contributing to such injury.

The presiding justice declined to submit any question of fact to the jury, and granted the non-suit applied for by the defence. To which refusal and decision the plaintiff excepted.

R. A. Parmenter, for the appellant.—I. The former decision of this court in this cause reported 24 *How. Pr.*, 97, furnishes no authority for taking the case from the jury on the questions of fact presented by the evidence given on the last trial. 1. Additional witnesses were examined for the plaintiff on the principle issues. 2. The train is now shown to have been running at a materially higher rate of speed than was asserted on the former trial. 3. It appears that it was the custom of the defendants to employ a flag-man at the crossing in question; but on the morning of the accident he was absent and no flag was displayed. 4. Some testimony on the former trial to the fact that Ernst was cautioned to stop when about to cross the track, was not repeated upon the present trial.

II. The question touching the negligence of the defendants was clearly one of fact for the jury, and the defendants' negligence was established beyond all dispute. 1. The evidence tends to prove that the train was running at an imprudent rate of speed over a public highway extensively traveled. Competent judges testified that on approaching the crossing it was moving at the rate of from thirty to forty miles an hour; that at least it was running "very fast." 2. The duty imposed by statute, and ordinarily observed, of ringing a bell or blowing a steam whistle preparatory to crossing an extensively traveled road on the same level with the railroad (2 *Rev. Stat.*, 5 ed., 688, § 50), is shown to have been entirely disregarded. If the jury believed the evidence of seven persons who were present, and in a situation to hear, they were authorized to find that there was no signal by bell or whistle until the instant of the collision; when the bell was rung and the whistle blown to "brake up." The omission attracted the attention of the bystanders and was the subject of conversation at the very time. A single witness failing to hear the bell or whistle might be entitled to little weight against positive testimony of employees

to the performance of the duty; but where, as in this case, a large number of attentive witnesses testify that the act was not done, a plain question of fact for the jury is presented. 3. The fireman in charge of the engine is shown to have neglected his duty as a "look-out," at the time of the accident. 4. It is shown that it was the duty of the defendants' flag-man, appointed to stand at these crossings, to be at his post to warn foot-passengers and vehicles of the approach of trains. The fact that the flag-man was absent on the occasion, is not controverted. The omission to keep a flag-man at the post, occurring after an invariable custom of years standing to do so, was negligence.

III. The question whether upon the evidence, as it stood upon the last trial, the decedent was guilty of negligence, was also one of fact, which should have been submitted to the jury under proper instructions from the court. In general, negligence is a question of fact for the jury. (*Angell on Carriers*, §§ 7, 16, 27, 51, 184; *Story on Bail*, § 11; *Jones on Bail*; 2 *Stark. Ev.*, 528; *Greenl. Ev.*, § 49; Ireland *v.* Oswego, &c., Pl. Road Co., 13 *N. Y.*, 533; Oldfield *v.* N. Y. & H. R. R. Co., 14 *N. Y.*, 310; Hogan *v.* 8th Av. R. R. Co., 15 *N. Y.*, 383; Keller *v.* N. Y. Cent. R. R. Co., 24 *How. Pr.*, 177; Bernhardt *v.* Rensselaer & Saratoga R. R. Co., 23 *Id.*, 168 and 32 *Barb.*, 168; Jonhson *v.* Hudson R. R. R. Co., 20 *N. Y.*, 73; Fero *v.* Buffalo & State Line R. R. Co., 22 *N. Y.*, 215; Lynch *v.* Murdin, 41 *Eng. Com. Law*, 425; Cook *v.* Champlain Trans. Co., 1 *Denio*, 100; Creed *v.* Hartman, 29 *N. Y.*, 591; Newson *v.* N. Y. Cent. R. R. Co., 29 *N. Y.*, 389; Stinson *v.* N. Y. Cent. R. R. Co., 32 *N. Y.*, 336; Brown *v.* N. Y. Cent. R. R. Co., 32 *N. Y.*, 602; Stokes *v.* Saltonstall, 13 *Peters.*, 181; Oghier *v.* Penn. R. R. Co., 35 *Penn.*, 60; Phila. & Reading R. R. Co. *v.* Spearen, 47 *Id.*, 305; Willing *v.* Judge, 40 *Barb.*, 207; Magrath *v.* Hudson R. R. R. Co., 32 *Barb.*, 148).

John H. Reynolds, for the respondent. 1. Upon substnatially the same case as now presented, it has been determined by this court that the plaintiff is not entitled to recover (Ernst *v.* the Hudson River R. R. Co., 24 *How. Pr.*, 97).

II. The case depends upon a few leading facts, in respect to

which there is no dispute, and they stand in the case now as they did when this court decided that the plaintiff could not recover. 1. These facts are that the accident occurred in open day, and the deceased was perfectly well acquainted with the locality and knew all about the railroad crossing. The track of the railroad was plainly to be seen, and a train of cars coming from the north was plainly visible to any person who turned his eyes in that direction for the distance of nearly one-third of a mile above the crossing, and it could also be heard a considerable distance. Ernst, on this occasion, sat down in his sleigh—drove his team rapidly, looking neither to the right or left—gave no heed to repeated warnings that the cars were coming, and, without checking his speed in the least, reached the railroad track just in time to collide with the cow catcher of the engine. He did not exercise the slightest care, or pay the least regard to the fact that he was coming to a railroad crossing, when the very least attention to the circumstances about him would have saved his life. This was such a want of care as forbids a recovery. (See the former decision of this court, 24 *How., Pr.*, 97; Wilds *v.* Hudson River R. R. Co., 20 *N. Y.*, 430; S. C., 29 *N. Y.*, 315; Johnson *v.* Hudson River R. R. Co., 20 *N. Y.*, 65; Stevens *v.* Oswego and Syracuse R. R. Co., 18 *N. Y.*, 422, 427; Dascomb *v.* Buffalo & State Line R. R. Co., 27 *Barb.*, 221; Brooks *v.* Buffalo & Niagara Falls R. R. Co., 25 *Barb.*, 600; Cotton *v.* Wood, 8 *Com. Bench*, 566; Toomey *v.* London, Brighton, &c., R. R. Co., 3 *Com. Bench*, 146; Gehagan *v.* Boston & Lowell R. R. Co., 1 *Gray*, 187; Fox *v.* Town of Glastenbury, 29 *Conn.*, 204; O'Brien *v.* Philadelphia, &c., R. R. Co., 6 *Am. Law Reg.*, 361.) 2. The additional evidence given on the last trial does not in the remotest degree tend to diminish the effect of, or raise any conflict with the undisputed facts on which the judgment of the court of appeals proceeded. This evidence relates to the facility in which a train of cars may be stopped at a given rate of speed, and as to the custom of the defendant in keeping a flag-man at the Bath station. If the train was moving at a high rate of speed, it does not tend to excuse the negligence of the deceased, even if tends to show want of due care on the part of the defendant, and there is no

evidence that the train was running at any unusual rate of speed. And the new evidence as to the custom of the defendant to have a flag-man at this crossing to warn travelers of the approach of a train is merely cumulative; and if it was entirely new, it would not change the case, for Ernst knew he was coming to a railroad crossing, and was bound to approach it with caution. He was bound to look and listen for a train.

III. It was not competent to prove the declarations of Ernst, as to whether he heard the warnings of the approach of the train or not (Jackson *v.* Kniffin, 2 *Johns*, 31; Betts *v.* Jackson, 6 *Wend.*, 173; Wilson *v.* Boerum, (*Anthon's N. P.*, 15) 174 *Johns*, 286; Kent *v.* Walton, 7 *Wend.*, 256; Gray *v.* Goodrich, 7 *Johns*, 95; *Stark Ev.*, 8 ed., 30, 35; *Greenl. Ev.*, § 156; Commonwealth *v.* Carey, 11 *Cush.*, 421). And if Ernst did not hear the warnings of the approach of the train, it can make no difference, if they were in fact given. If due warnings of the approach of a train to a crossing are in fact given by a railroad company, it does not make them liable for the death of a traveler, that if by reason of deafness, inattention or stupidity, they are not observed.

PORTER, J.—When this case was here on a former occasion, a new trial was granted on the ground that a nonsuit had been refused, upon a state of facts, of the truth of which there is now no pretense. That decision is unreported in the regular series; but one of the opinions delivered in this court is contained in another law publication (24 *How. Pr.*, 97). In that report, through some misapprehension or oversight, the head-notes, as well as the preliminary statement of facts, are essentially erroneous. The body of the opinion, however, discloses a very striking difference in the evidence, as then and as now presented, on the vital question, whether the husband of the plaintiff was a negligent and guilty participant with the defendant in the wrong which resulted in his death. We find the difference still more marked on examining the printed cases, upon which the decision of this court was founded.

It seems that the plaintiff was surprised on that trial by proof, which she probably had no reason to expect, but which was not repeated on the last trial, when she was prepared with

evidence to meet it. The prevailing opinion assumes—and we are at liberty, and perhaps bound, to suppose that the testimony of Simmons, Butler and Waltemyre, whom the defendant did not call on the last trial, justified the assumption—that Ernst was intoxicated on the occasion of the collision; that he drove so carelessly by the way that he nearly tipped over; that he was cautioned at the time by the person riding with him to drive more carefully; that he was partially deprived of the use of his ordinary faculties; that he knew the stated times for the passage of the trains; that this was, in fact, a regular train, on its stated and customary time; that it was notoriously due at that hour; that Dearstyne's hotel, at which Ernst stopped, was 150 feet east of the track; that he started from there at a rapid rate of speed; that other persons heard the train coming at quite a distance; that *four* of them, after he started from the tavern, respectively called to him in a loud voice *to stop*, several times each; that quite a number of persons saw the approach of the train; and that he had an open view of it, nearly all the way from the hotel to the crossing, for a distance of a hundred rods from the highway on which he was riding. (24 *How.*, 102, 108, 110).

In the light of the evidence given on the last trial, it is not difficult to infer why testimony like this was not reproduced, when the plaintiff was prepared to meet it. Simmons, one of those witnesses, swore there was a box on the testator's sleigh, and a seat on the box; represented, in substance, that this intoxicated man, who had been running his horses and drinking at every tavern, had his head, as well as his face, bundled up in a big shawl; that he, himself, heard the cars coming, and standing near the track, face to face with Ernst, when the latter was halfway down from the tavern, told him to stop for God's sake or he would be killed. It appears that Butler, on that occasion, swore with equal zeal. His version of the matter in substance was, that he stood at the northwest corner of Broadway and Rensselaer streets; that he hallooed from there to Ernst as he was passing, to hold on; that the testator appeared to hear him, but turned his head away, and, in defiance of the warning, drove on to the crossing. Waltemyre, on that trial, went further still, and, in effect, represented Ernst as driving

his horses on the track directly in front of the engine, though warned of its approach by the whistle, the bell and the flagman.

The testimony of these three men, then given and now withheld, explains the former decision that, upon such a state of facts, the plaintiff should have been nonsuited. It also explains why that decision was by a divided court. Such testimony, though not met by a point-blank contradiction, was too improbable in its nature, and too inconsistent with the other facts proved, either to obtain credence with the jury, or to commend itself to the full confidence of practised jurists. It happened that the case, upon the testimony as then given, was heard in this court and the court below, by ten of the judges, only five of whom differed in their conclusions on the question of fact from the jury. It is scarcely to be supposed that they would have hesitated to approve the verdict, if it had been rendered upon the proof presented by the respective parties on the subsequent trial.

It now appears that the prominent facts then relied on to inculpate the testator were fictitious. Instead of being a drunkard, stupefied or crazed with liquor, he is proved to have been an orderly, sober and respectable citizen. The pretense that he drank anywhere that morning is abandoned, and his family physician testifies that he never knew him to be intoxicated. Instead of being deprived of the use of his faculties, he is shown to have been a man in the prime of life, of regular habits, with clear vision, and in perfect health. Instead of running his horses by the way, and starting from the tavern with reckless speed, he is shown to have been an experienced and practiced driver; and it is proved that, on this occasion, he started from the hotel on a walk, and continued to drive with moderation, prudence and judgment. The claim that he knew the stated times of the trains is also abandoned. The fact that this was a regular train, on its customary time, is alleged by none, even of the defendants' witnesses, except Gregory the engineer; and he is contradicted by Dearstyne, an intelligent and disinterested witness, who knew the time of the trains, waited for them with his ferry-boat, and observed the fact, at the time, that this was a train not then due. The

defendant, knowing the fact to be in issue, neither produced its time-tables, nor confirmed Gregory's statement by the testimony of any of its other employees. The absence of the flagman from his post is strong presumptive evidence that no train was due at that hour. Under such circumstances, no court has a right to assume, as matter of law, that the statement of the inculpated and impeached engineer is true, and that the contradictory testimony of a reliable and disinterested witness is false.

It now appears that, instead of the testator's riding a hundred and fifty feet in full view of the engine, the whole distance from the hotel to the track is less than a hundred and thirteen feet, and that he did not see the engine at all, until it emerged from behind the station-house, when the horses were in the very act of going upon the crossing. It also appears that, instead of his having, from the hotel down, except opposite the station-house, an open view of the northern track for a hundred rods, there was but one place in the whole distance where, even if he had been standing up and expecting a train, he could have seen it as far north as the ice-house, which was within five hundred and ninety-four feet of the crossing. The track, instead of being straight, was sharply curved. The view, instead of being open, was obstructed by intervening woods and upland. The natural point of observation, when there was no signal of an approaching train, would be at the corner of Rensselaer street, as he turned his horses round to the north and drove into it from Broadway. The proof is explicit, that from that point the range of vision is but about twenty rods, and it is equally decisive that, when he was at that point, the engine was behind the hill and woodland, at least fifty-seven rods above the crossing. Ernst, as he drove down, was sitting on the bottom of his sleigh, which had no box. This, of course, materially narrowed his range of vision, and made every intermediate fence an additional obstruction to the view.

There is no pretense now that any one east of the store which adjoins the track either saw or heard the train at all, until it reached the crossing. Ten Eyck and Hunter were at the store, within two or three rods of the rails. Both of them were looking north, and both unoccupied; yet neither of them

saw or heard the engine until it was within less than two hundred feet of them, the horses of Ernst being then close to the track and in full motion. It was not seen at all by the witnesses Taylor, Traver, Dearstyne and Vandenburgh until just before it reached the crossing; and none of them heard it until then, except the ferry-man, who was more familiar with the sound, and who detected it first, while looking in that direction from below on the river-side, when the cars were within three hundred feet.

The claim that four men were hallooing to Ernst to stop, when he was not yet half-way down, is also now abandoned. But two men hallooed at all, one from the store and one from the station-house, while the team was passing between them. If Ernst heard what either of them said, the fact is undisputed that no one else did. The warning was well meant, but it came too late. It was simultaneous with the *res gestæ;* with the rush of the engine, the plunge of the horses, and the ineffectual struggle of the testator to rein them back.

The proof is clear and decisive, that the bell was not rung nor the whistle blown until after the collision. Only two of the defendants' witnesses claimed that they were; and they were the two employees whose neglect of that duty cost Ernst his life. One of them was a mere boy. Both were impeached on material points, by their own oaths before the coroner's jury. They had officiated some two months before as engineer and firemen, when Wilds was killed. They were specifically contradicted as to the whistle and the bell, by two of the defendants' and five of the plaintiff's witnesses, and they were confirmed by nobody.

On the last trial it also appeared that this was a flag-station; that it was the known and uniform practice of the company, whenever there was a train advancing within eighty rods of the crossing on either side, to give notice to the public of its approach by exhibiting at that point a white flag if the engine was to stop, and a red flag if it was to pass without stopping. There was neither flag nor flag-man at the crossing; and thus the practice, which was adopted for the security of the traveler, was converted on this occasion into a snare for his destruction.

On this state of facts, there was nothing to justify the imputation of culpable negligence to the testator; and, most manifestly, there was nothing to warrant a court in adjudging his guilt as matter of law, without the intervention of a jury.

In determining the propriety of a nonsuit, we are legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conduced to prove, though their correctness be controverted by the defendants' witnesses. (Colegrove *v.* The New Haven and Harlem Railroad Companies, 20 *N. Y.*, 492; Merritt *v.* Lyon, 3 *Barb.*, 110.) It is the appropriate province of the jury to deduce inferences of fact, and to weigh doubtful or conflicting evidence.

The testator was lawfully upon the public highway. The right he had to use it was as perfect as that of the defendant to cross it. In the exercise of his legal privilege he did not expose others to injury, and was charged with no duty of extraordinary vigilance. The defendants exercised theirs, with agencies imminently perilous to human life, and they were under a correlative obligation to use them with the highest degree of care. As the highway was never dangerous except when they made it so by driving their engines across it, and as they never crossed it without some degree of jeopardy to the wayfarer, the law provided for the security and protection of the citizen, by requiring the defendants to give special and public warning whenever their engines approached the crossing.

The rights of the people of Rensselaer in their own highways are not subordinate to those of the railroad company. If the traveler is warned of the approach of an engine by the customary signals, or if by other means he is made aware of its proximity, it is his duty to avoid exposing himself to injury. If he advances on the open highway, with no cars in view, and no indications of their approach, either by signal or otherwise, he is at liberty to pursue his way without incurring the imputation of breach of duty to a wrong-doer.

The only condition of the right to redress for a wrong of this description is, that the party aggrieved be free from culpable negligence; and he is not chargeable with such negligence, unless he fail to exercise ordinary care and vigilance to avoid

the injury of which he complains. There has been some diversity of judicial opinion as to what ordinary care and vigilance demand of a party, upon a given state of facts; but, that this is the uniform standard, by which to test the right of the plaintiff, has been too often adjudged to be open to further discussion.

The rule is simple, practical, and easy of application. "The question is," as this court said, when the case was before it on a former occasion, "what would a majority of men of common intelligence have done under like circumstances?" (24 *How.*, 108.) "Ordinary care, skill and diligence, is such a degree of care, skill and diligence, as men of ordinary prudence, under similar circumstances, usually employ." (Brown *v.* Lynn, 31 *Penn.*, 512.)

The degree of care which men of common prudence would be likely to observe in a given case, must be determined with reference to all the attendant circumstances. An injury by an engine *in motion*, would necessarily be of a grave and serious character; but at a distance of eighty rods from the crossing, it would be as harmless to the wayfarer as the rail over which he drives. It is not unusual in argument to confound the seriousness of such an injury, when it occurs, with the probability of its occurrence, and to assume that the same degree of vigilance is demanded when the engine is not within the range of sound or vision, as when it is seen in close proximity, or public warning is given of its approach.

The measure of precaution which ordinary prudence suggests is in due proportion to the probability of danger. When a train is seen or known to be close at hand, a discreet man would stop until the danger is past; but to stand waiting in front of a public crossing, with no reason to believe that there is an engine within a quarter of a mile, would indicate overcautious timidity, and would seem to most men puerile. On such subjects, as on all others, men exercise their reason, and and do not yield to childish apprehensions of distant engines, or unloaded guns. When they draw near a railway crossing, and the flag-man gives no warning, when no sign or sound indicates the presence or approach of a train, they assume that they may safely cross, and proceed quietly on their way. If,

in such a case, an engine, with muffled bell, rushes upon them too suddenly for escape, the wrong is due to those who falsely assured their safety by withholding the usual warning.

The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence, for assuming that there is no car sufficiently near to make the crossing dangerous. (Newson *v.* New York Central R. R. Co., 29 *N. Y.*, 390; Johnson *v.* Hudson River R. R. Co., 20 *Id.*, 74; Hegan *v.* Eighth Avenue R. R. Co., 15 *Id.*, 383; Harper *v.* Curtis, 1 *E. D. Smith*, 78; Gordon *v.* Grand Street R. R. Co., 40 *Barb.*, 550; Pennsylvania R. R. Co. *v.* Oghier, 35 *Penn.*, 60, 72.) In the case first cited, Judge JOHNSON, who delivered the opinion of the court, stated the rule thus: "The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both." In the case of Gordon *v.* Grand Street R. R. Co., Judge BROWN traced the rule to the reason on which it was founded. "Negligence," he says, "cannot be predicated of such an act. Care in avoiding danger implies that there is, or would be with all prudent persons, something to create a sense of danger; for, if the circumstances are not such as would put a prudent and cautious person upon his guard, the omission to exercise more than ordinary attention is not the negligence which contributes to an accident." In the case last cited, the court, in considering the effect of the omission to give the customary signals, on the question of due care by the plaintiff, used language equally explicit. "A defendant cannot impute a want of vigilance to one injured by his act, as negligence, if that very want of vigilance were the consequence of an omission of duty on the part of the defendant."

In the present case, the defendants not only misled the testator by not exhibiting the flag at the crossing, in accordance with the uniform custom when an engine was near, but also by approaching the highway illegally, neither sounding the whistle nor ringing the bell as they advanced. This was an act in open defiance of a public statute, enacted for the protection of the traveler. It was a flagrant breach of duty to the passengers, whose safety it jeopardized; to the stockholders,

whose property it imperiled; and, to the testator, whose life it exposed. Its direct tendency was to put him off his guard, to disarm his vigilance, and to produce a false sense of security. To transfer the blame to him, would be to screen the wrong-doer at the expense of the victim. It is not the policy of the law to favor those who deliberately violate its mandates, nor is it the duty of the courts to invent excuses for wrong-doers, or to palliate the guilt of reckless homicide. Our statutes for the protection of life are to be obeyed; and when they are broken and defied, responsibility is not to be invaded by imputing blame, without proof, to him who suffers death, for the sake of shielding those who inflict it.

In this case, the parties inculpated have been sworn. Ernst, of course, could not confront them; but we are to judge him in the light of the evidence, by the ordinary rules which govern human action. He was a man of business, in the vigor of middle-life, and in the full possession of his faculties. He was a man of family and of character, of experience and of judgment. He had no apparent motive or inducement to make a wanton sacrifice of his life. He had the ordinary instincts of humanity. If, on this occasion, he did anything which he ought not to have done, or left undone anything which he ought to have done, it was in the brief interval of nineteen seconds.

It is said he should have looked north before he drove down the street, which the defendant, by violating the statute, could convert into a *cul-de-sac* to the traveler. That was precisely what he did. In turning his horses around to drive from Broadway into Rensselaer street, he necessarily faced to the north and west, thus commanding a view of the track directly in front for a distance of some twenty rods. He did not see the cars, for the simple reason that they were not there. They were still behind the hill, and nearly sixty rods northeast of the crossing.

It is claimed that he started at a high rate of speed; but the proof is that he started on a walk; that he went down Rensselaer street on a slow trot, and that he did not quicken his gait until, as he approached the track, he was beckoned to hasten on to the ferry-boat, which was waiting for him at the landing.

It is also said that he should have been on the look-out for the flag, uniformly displayed at the crossing when a train was near. He did look, and he saw that there was no flag; which was a direct assurance by the defendant that there was no engine advancing on either side within a quarter of a mile. He was forewarned of no approaching danger, and it was not to be expected, under such circumstances, that he should be forearmed with extraordinary vigilance.

The plaintiff is reproached with the fact that her husband had a shawl round his neck. It is the ordinary precaution, on a cold winter morning, of every traveler who has one to wear, and it was no more a breach of duty to this railroad company, than it would have been if he had worn a fur cap or a second overcoat.

It is claimed that he should have listened for the whistle and the bell. He did; and the fact that neither was sounded, was a further assurance by the defendant that there was no engine in motion within eighty rods of the crossing.

It is also claimed that he should have stood up in his sleigh. He owed no such duty to the defendant. It would be scarcely more absurd to hold that a footman should climb a tree or mount a fence before crossing, to assure himself that the company was not breaking the law, by sending an engine without signals, to run over travelers on a public highway.

It is insisted that he ought to have looked before him, and on both sides as he advanced. He did, for he is proved to have been a man of clear vision, and he could not avoid so looking, except by closing his eyes. He was sitting on the bottom of his sleigh, and, of course, his range of view was essentially limited; but to say that he did not or could not see whatever was within that range, would be in direct hostility to the proof. It would be as idle as it would be to assume that one who is driving down the center of State street, cannot see that there are buildings on both sides of the way, or that a Hudson river pilot cannot see both shores of the river in front of him, without turning his head back and forth in the wheel-house.

It is said that he should have observed the man who was beckoning to him from the ferry-side of the track. He doubt-

less did, unless the horses in front of him partially obstructed his view; and it is reasonable to assume that he understood it, as others did, as urging him to hurry on to the boat.

It is claimed that he was bound, by an inflexible rule of law, to see, to hear and to understand the two persons who hallooed—one from the station-house, and the other from the store, as he was passing between them. There is no such rule of artificial presumption, and we see no reason for its adoption, if we were at liberty to change the law of evidence. It would be an arbitrary legal intendment on a pure question of fact, without reason or truth to commend it. We have no authority to invent rules for the purpose of shielding wrong-doers. It was a question of fact for the jury, whether the testator saw and heard these men. His advanced position and his winter attire did not favor a lateral view. It is obvious that he did not hear what they said, for it was heard by no one else; and they were speaking simultaneously from opposite sides of the street. Neither of them called him by name; and if his attention was directed, as it naturally would be, to the movement of his horses, and the steep descent to the ferry-boat directly in front of them, he probably assumed that the men were speaking to each other across the street, an incident of ordinary occurrence in a country village. It is quite probable, too, that he heard simultaneously the rush of the train, as all this occurred within a few seconds of the fatal collision. His horses were under full headway; and every one who is accustomed to drive knows the difficulty of controlling even a single horse, when brought suddenly in presence of an engine, rushing upon him at the rate of forty miles an hour. It is proved and undisputed that his horses were frightened; that they sheered southwardly on the track, and that he struggled, ineffectually, to rein them back. The evidence establishes an adequate cause of death in the defendants' wrong. It affords no warrant for imputing to the testator the guilt of complicity in that wrong.

The comments made by Judge WRIGHT upon the proof, in the grossly exaggerated form which it assumed on a previous trial, have still more controlling force in their application to the evidence as now presented, when the most important portion of that then given by the defendant is abandoned. "It is

doubtful from the evidence," said the learned judge, "whether, at the time the signals and hallooing occurred, the deceased had not approached so near the track that it was impossible to stop his horses short of it, even if he had heard and understood the warnings to be of the approach of the cars. This was a question for the jury; for, to have given these warnings any significance, the fact should have clearly proved that it was in his power, by heeding them, to avoid the collision. So, also, the signals and hallooing were understood differently by the bystanders. One thought they meant to keep off; another, to come on the boat; while others did not understand their meaning at all. The whole transaction must have been embraced within a few seconds of time; and the hallooing and gesticulations of the bystanders, even if observed by the deceased, were well calculated to confuse him. Those who made the motions did not understand each other. The deceased was bound for the ferry-boat, then on the point of leaving, and was hailed to come on. The hallooing proceeded from different points. Hearing no bell or whistle, and observing no flagman, the decedent might well have concluded that no train was approaching, and that the hallooing was to hasten him towards the boat. It is fair to presume that he did not hear the words spoken, as the witnesses did not hear what was said by each other. At all events, I think it was a question for the jury, whether Ernst did not understand the signals and outcries as invitations to hasten to the ferry-boat; and if he did so understand them, then I agree with the learned judge who delivered the opinion of the court in this case on the former hearing, that they were calculated to induce him to do just what he did do, and might naturally disarm a prudent person of the suspicion of danger approaching from another quarter."

In a subsequent portion of the same lucid and able opinion, he adds: "He had a right to assume that, in propelling their cars, the defendants would act with appropriate care; that trains would approach the crossing at proper speed; that the usual signal of approach would be seasonably given; that the managers of the train would be attentive and vigilant; that the flag-man would be at his post and guard the crossing on the arrival of trains not intending to stop. Ordinary prudence

scarcely dictated that he should so have conducted as to protect himself against the culpable acts and omissions of duty of the defendants' employés, in propelling a train of cars past a known station, and across a crowded thoroughfare, at the speed of forty miles an hour, ringing no bell, sounding no whistle, disregarding the look-out, and having no flag-man on duty to warn of impending danger. Seeing no flag-man, and hearing none of the usual signals of the approach of a train, it was not unreasonable or imprudent to conclude that no train was approaching, and that consequently there would be no danger in passing over the track. Besides, the tendency of a neglect by the employés of the company to give proper notice of the approach of the train, was to cause the deceased to be less attentive than he otherwise would have been. He was, by the negligence of their employés, in a degree thrown off his guard, and induced to attempt to cross the track apprehending no danger. The presumption is irresistible that he would not have taken a step toward hazarding his life if he had been made aware, by the usual signals, of the proximity of the train. It is by no means clear that he did not see the train after getting west of the station-house, but too late, in the excitement and confusion of the moment, to have so controlled his horses as to have avoided the collision."

The dernier claim of the appellant, all other defenses failing, is, that the testator was guilty of culpable negligence in not listening for and hearing the rumble on the rails of a train which he had no reason to expect, and which gave no signal of its approach. That he did not hear it in time to escape the collision is so obvious that the defendants do not claim that he did; but they insist that he ought to have heard it, and that his failure to do so was a breach of duty to the company.

This theory is founded on the incidental opinions expressed by two of the witnesses, not as to the distance this train might have been heard, under the actual circumstances and with the intervening obstructions, but on the general question how far it might be possible to hear a train approaching, when omitting the customary signals in violation of law. Neither of them professed to speak from actual knowledge or observation, and their estimates were widely different. One thought

it might be detected at a distance of one or two miles, and the other, that it would not be audible, when the whistle would be, at the distance of seven or eight rods. It is obvious that speculative opinions on such a question scarcely rise to the grade of evidence. The distance at which the approach of a train can be heard, without the signals, must depend on a great variety of circumstances, such as the structure and condition of the particular rails, the firmness of the ties, the size of the train, the direct or winding course of the track, the condition of the atmosphere, the direction and force of the wind, the shutting off of steam, the proximity of the listener to the line of the rails, the prevalence of other sounds, the acuteness of the observer's hearing, the depression or elevation of the track, the vicinity of valleys, woods and hills, the hour of the day or night, the comparative silence of the country, or the hum and bustle of city life, and the vicinity of steamboats, factories and public works. Mere speculation on the general question, without reference to these and other like conditions, is plainly idle and illusory. It is proved, as matter of fact, that though such a number of witnesses were present on this occasion, each under more favorable circumstances for hearing it than the testator, the practiced ear of the ferry-man who listened daily for the approach of the trains, did not catch the sound until the engine was within three hundred feet; Taylor, Traver, Ten Eyck, Hunter and Van Denburgh did not hear it at all until just as it rushed down over the crossing; the horses of Ernst did not hear it until they were close upon the track; and at the ice-house, Brown did not hear it until his wagon was upon the rails, and the engine within less than a hundred feet of him.

It was because the approach of a railway train is stealthy and imperceptible, and because the sound is not readily distinguishable from others associated with no danger, that, to secure the traveler at once against needless apprehension and needless exposure, a statutory mandate was given to every such company in this State, to approach no public highway crossing with an engine, without public and distinctive signals of danger for a distance of eighty rods before passing such crossing.

The duty is plain and absolute. The company which violates

it does so at its peril. If its agents are faithless, it should dismiss them. If its officers choose to disobey a law for the protection of human life, or to tolerate its violation by their subordinate agents, the remedy is in the hands of the stockholders by selecting those who will respect our public statutes. When the illegal act results in the death of a citizen, the company must respond, unless he has been guilty of a breach of duty which contributed to his destruction. He is not guilty of such breach of duty when he assumes, in the absence of any indication to the contrary, that the company obeys the law, and that no engine is advancing to the crossing, within a distance of eighty rods, without public signals of its approach. If he is deceived by the unlawful omission of the signals, the wrong is not his, but theirs. The illegal act of the company does not however, justify him in encountering the risk of crossing, if he sees or hears the approach of the engine, or is otherwise notified of its presence in season to avoid the peril. In that case, he is guilty of culpable negligence, and the company is relieved from the responsibility of causing his death. But it is no defense to the wrong-doer that though the victim *did not* see or hear the engine and was not notified of its approach in time to avoid the collision, he *might* have seen or heard it, if he had exercised a higher degree of vigilance, and had foreseen a violation of the law, instead of relying upon its observance. Such a theory has received countenance in a few instances in the opinions of individual judges. It has support in the *dictum* of the accomplished and able jurist who delivered the prevailing opinion in this cause on a former occasion. This question, however, was not then passed upon by the court, nor was it involved in the decision. On the proof as then presented, the question was, whether one was culpably negligent, who rode nearly a hundred and fifty feet in full view of an approaching train, who knew it to be due, and who insisted in driving against it, though notified by four persons of its presence in season to avoid the danger.

The usual argument in favor of the theory in question is, that trains are constantly passing and repassing at every railway crossing. Certainly, we are not admonished of this by the constant ringing of bells; and every man of ordinary

observation knows the fact to be otherwise. If ten regular trains a day run over a given highway, they render the crossing unsafe when they pass, and only then. It is free from danger except, at most, for twenty minutes, in the aggregate, of each twenty-four hours; and the traveler is safe against exposure at those momentary intervals, if the company obeys the law and rings the bell. If it will not do that, it has no cause of complaint against the wayfarer whom it voluntarily misleads. In such a case, the language of Chief Justice BEARDSLEY is appropriate: "A man is under no obligation to be cautious and circumspect toward a wrong-doer." (Tonawanda R. R. Co. *v.* Munger, 5 *Denio*, 266.)

It is not true that a traveler on a public thoroughfare is guilty of culpable negligence, as matter of law, if he does not stop to listen, or look up and down the track before he goes over a crossing. The proposition is in direct conflict with repeated adjudications in this and in other courts. Whether such an omission is culpable, depends upon the facts and circumstances of each particular case.

There is a class of cases, in which the proof of the plaintiff's negligence is clear and undisputed; and whenever this appears a nonsuit is matter of legal right. A party who sees or hears an approaching engine, and chooses to take the risk of crossing before it, rather than await its passage, forfeits all claim to redress; and, under such circumstances, it is not only the right but the duty of the courts to apply the familiar rule—*volenti non fit injuria*. But there is another class of cases, in which it is equally well settled that we have no authority to impute negligence to the deceased, for an omission which may fairly be attributed to the very wrong resulting in his death.

In the case of Brown *v.* The New York Central R. R. Co., decided at the last June term, we held that no culpable negligence was established, though it was proved by the driver of the coach demolished by the collision, *that he did not look in the direction from which the cars were approaching until his horses were on the track*, the usual signal of danger not being given as they advanced to the crossing; and this, though it appeared in evidence that, if he had looked before, he would have seen them in season to avoid the collision. (32 *N. Y.*, 597.)

The doctrine of that case was unanimously reaffirmed upon a like state of facts, at the last December term of this court. (Stillwell *v.* New York Central R. R. Co.)

In the earlier case of Megrath *v.* The Hudson River R. R. Co., the same rule was clearly announced. "It is not always negligence," said the court, "to cross a railroad track at times when a train is not due, or cannot reasonably be expected to pass; *nor to cross a railroad track without looking for a train*, when no signal of its approach is given by the ringing of a bell or otherwise." (32 *Barb.*, 147.) So, also, in the case of Warren *v.* The Fitchburgh R. R. Co., it was held by the supreme court of Massachusetts, a State in which no undue rigor of intendment is supposed to prevail on this subject, that crossing a railroad track, *without looking to see if a train is coming*, is not conclusive proof of want of care. (8 *Allen*, 227.)

In the case of Fero *v.* The Buffalo & State Line R. R. Co., it was claimed that the plaintiff could not recover for the injury, as it was apparent that he could readily have averted it by the exercise of greater care; but this court held that "if he was guilty of no culpable negligence, the mere fact that he might have been more vigilant will not excuse the wrongful act of the defendants, nor deprive the plaintiff of redress for the injury he has suffered." (22 *N. Y.*, 213.)

The question whether the plaintiff was free from negligence, in ordinary cases of this description, is one of fact to be determined by the jury, under appropriate instructions, and subject to the revisory power of the courts. Occasional instances occur, where the proof of misconduct is so clear and decisive, that the judges are bound to pass on the question of negligence as matter of law. It is a mistake, however, to suppose that the decisions made, from time to time, in these two classes of cases, conflict with each other, or involve any departure from the settled rules of law.

Where the question arises on a state of facts, on which fair-minded men may rationally arrive at opposite conclusions, the issue is properly submitted to the jury. Where, as sometimes happens in exceptional cases, the injury is traceable to clear and unquestionable misconduct on the part of the plaintiff, it is the plain duty of the court to apply the law to the facts

without the intervention of the jury. In the present case, there is a renewal of the attempt so often made, to extend the exceptional rule to all classes of cases. It is our province to uphold the law, and not to alter it. We believe it to be wise and just; but, if we deemed it otherwise, we have no authority to subvert it. We should be restrained from making the innovation proposed, not only by our own repeated adjudications, but by that time-honored and elementary maxim on which our system of jurisprudence is founded: *Ad questionem facti, non respondent judices;—ad questionem legis, non respondent juratores.*

The views of this court as to the right of the party claiming redress, to have the question whether he was free from negligence determined, ordinarily, by the jury, have been repeatedly expressed with great clearness and emphasis.

In the case of Ireland *v.* The Owego R. R. Co., Judge JOHNSON said: The fact of negligence is very seldom established by such direct and positive evidence, that it can be taken from the consideration of the jury and pronounced upon as matter of law. On the contrary, it is almost always to be deduced as an inference of fact, from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their force and weight considered. In such cases, the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science, like presumptions of law. That the care exercised by the plaintiff at the time of the injury, and the negligence of the defendant, were both questions for the jury to determine, cannot admit of any doubt." (3 *Kern.*, 533.)

In the case of Keller *v.* The New York Central R. R. Company, Judge MASON delivered the opinion of the court, and after citing the foregoing exposition of the rule, he proceeded to say:

"What constitutes negligence in such cases, is determined by an inference of the mind from the facts and circumstances of the case; and, as minds are differently constituted, the in-

ference from a given state of facts and circumstances will not always be the same. I admit that the facts may be so clear and decided, that this inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but when the facts, or the inference to be drawn from them, are in any degree doubtful, the only proper rule is, to submit the whole matter to the jury under proper instruction. (26 *How.*, 177.)

Similiar views were expressed by Judge DENIO, in the case of Hagan *v.* The Eighth Avenue R. R. Co., and by Judge SELDEN, in that of Bernhardt *v.* The Rensselaer and Saratoga R. R. Co. It was said by the latter, with the precision and perspicuity which mark all his judicial opinions, that, "although, as a general rule, questions of negligence belong exclusively to the jury, cases may no doubt arise in which the proof of negligence would be so clear and irresistible, that the court would be justified in assuming, without submitting the question to the jury, that negligence was established. At the same time, it is obvious, considering the nature of the question, that such instances must be rare. If there is any conflict in the evidence going to establish any of the circumstances upon which the question depends, it must be left to the jury. If there are inferences to be drawn from the proof which are not certain and incontrovertible, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be *likely to do* under the circumstances proved; this, involving, as it generally must, more or less of conjecture, can only be settled by a jury." (23 *How.*, 168.)

The struggle of defendants to inaugurate a different rule, and to induce the courts to resort to artificial refinements for the protection of wrong-doers, is, perhaps, excusable in those who are impatient of legislative restraint. There is an unfortunate and growing tendency to regard human life as of secondary importance in comparison with the objects of commercial and corporate enterprise. The aid of the courts is invoked to annul by indirection the force of general laws. Suits and appeals multiply in the constantly increasing ratio of reckless injuries, which nothing could tend more to encourage than this

theory of immunity from civil damages, on the assumption, as matter of law, that a party over whom an engine is driven is culpable for not keeping out of the way, and that the question, whether he was really guilty of negligence, is not one of fact for a jury.

If it be true, as is sometimes intimated, even from the bench, that false verdicts are occasionally rendered on questions like this, the remedy is to set them aside and not to usurp the prerogative of the jury. Even among the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed; and the inquiry naturally occurs to the mind whether we are less liable than jurors to err on questions of pure fact pertaining to the ordinary affairs of life. Our law is framed upon the theory that, on such questions, the citizen can rely with more security on the concurrent judgment of twelve jurors than on the majority vote of a divided bench. Unanimity is not required in our decisions on questions of law. It is otherwise with jurors charged with the duty of determining issues of fact; and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result that there is no room for honest difference between intelligent and upright men. A nonsuit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that if the question were submitted to the jury they would find that the culpable negligence of the plaintiff contributed to the injury. But we have had occasion recently to hear nonsuits of this kind justified on the novel ground that unless the fact be determined in one way by the judge, it will be sure to be determined the other by the jury. The correctness of judicial opinions on mere questions of fact may well be distrusted when we find them confessedly opposed to the common sense of mankind.

The judgment should be reversed, and a new trial ordered.

HUNT, J.—On the 29th day of December, 1855, Henry Ernst, while driving his horses before a lumber sleigh, came into collision with the defendants' cars, when crossing a highway in the village of Bath, in the county of Rensselaer. The plaintiff

is the executrix of the said Ernst. The case has been tried three times. Upon the first trial the plaintiff was nonsuited. This nonsuit was set aside by the general term of the third district, and a new trial granted. (32 *Barb.*, 159.) The second trial resulted in a verdict of $2,500 for the plaintiff. The judgment was affirmed by the general term, but upon an appeal to this court, the judgment was reversed and a new trial ordered. (19 *How. Pr.*, 97.) On the third trial, at the close of all the evidence, the court directed the plaintiff to be nonsuited. The defendants asked for this nonsuit on the ground that the evidence did not establish negligence on the part of the defendants, and on the further ground that the evidence showed that the deceased was guilty of negligence on his own part, contributing to the injury complained of. The motion was resisted by the plaintiff's counsel, who requested the court to submit to the jury the several questions of fact involved in the motion and arising upon the evidence. The learned judge who tried the case declined to submit any question of fact to the jury, and nonsuited the plaintiff. The general term of the third district affirmed the judgment upon this nonsuit, and the plaintiff now brings it to this court for review.

In making this decision at the circuit, the judge necessarily decided that upon the testimony given, and in its most favorable aspect, and conceding to the plaintiff the benefit of all doubtful or disputed questions, a verdict for the plaintiff could not have been sustained, but would have been set aside upon presentation to the supreme court. If such shall be found to be the result of the evidence, the judgment must be affirmed; but if a finding of the jury in favor of the plaintiff could have been sustained, then the judgment must be reversed.

The only questions of fact which it will be necessary to examine are those of negligence—first, of the defendants, and next, of the deceased. The proof is in many respects different from that upon the former trial, as recited in the opinion given in this court by Justice E. D. SMITH, and that opinion is not therefore controlling on the present questions. On the question of the defendants' negligence, I entertain no doubt that there was evidence on which the jury would have been justified in finding this point against the defendants. The speed of the

train, whether it was on or off time, whether the bell was rung and the whistle blown, as required by the statute, the absence of a flag-man, where one had been accustomed to be stationed, the failure of the engineer to look ahead to the left, the presence of Waltemyre on the engine, whether authorized or unauthorized, were questions which would have afforded the jury room for a fair exercise of their judgment, and their decision would not have been disturbed if it had been in favor of the plaintiff.

The principal question, however, arises upon the other point, of concurring negligence on the part of the deceased, contributing to produce the injury. The facts as proved, and as the jury would have the right to infer them to be, exercising their power of finding all doubtful points in favor of the plaintiff, may be stated as follows:

On the day in question, the deceased drove his empty sleigh, with a pair of horses, into the village of Bath, intending to cross the ferry to Albany. The boat was not ready, and he fastened his horses in front of the tavern and went in. In a short time notice was given that the boat was ready, his associates crossed over the track in their sleighs, one of them remaining near the track to assist the deceased, the others reaching the boat; the deceased came out, unhitched his horses, sat upon the bottom of his lumber sleigh, drove northerly a few feet, turned westwardly, drove one hundred and twelve feet toward the ferry, when he reached the railroad track, when his horses were struck by the engine and cars going southwardly, his horses killed, and himself so badly injured that he died within a few days thereafter. As he drove northwardly from the hotel, he could see up the railroad a distance of thirty rods. After turning westwardly toward the ferry and going a short distance, the view of the road northerly was cut off by the station-house, a building extending about fourteen feet in a direction easterly and westerly. As the deceased approached the train, he was driving on a moderate trot; he was shouted at three times by a man standing on the steps of a store adjoining the track, that the cars were coming, to which he paid no apparent attention. Whether he heard or understood, does not appear. One of the railroad

hands east of the track made motions to him, intended by the maker as signals to stop, and one of his own comrades, Simmons, on the west side of the track, made signs intended by him to effect the same purpose. The deceased drove on at a moderate trot till he reached the track. The train, as one witness testified, was running at a speed of forty miles per hour, which would carry the train over the thirty rods in about eight and a half seconds, and over fifty rods in about fourteen and and one-sixteenth seconds. The deceased was a frequent passer at this place, and it had been the established custom there for some years that a flag-man, with a white flag, should signal the approach of cars not intended to stop, and with a red flag when the train was expected to stop.

These are the substantial facts bearing upon the point now under consideration. The cases in this court of Wilds *v.* The Hudson R. R. Co. (29 *N. Y.*, 315); Brown *v.* N. Y. Central R. R. (32 *Id.*, 597); Newson *v.* The Same (29 *Id.*, 383); Steeves *v.* Oswego & Syracuse R. R. Co. (18 *Id.*, 422); and in Pennsylvania, of North Pa. R. R. Co. *v.* Hilman (49 *Pa.*, 60), contain the recent expositions of the law now to be examined. The case of Steeves decides that gross negligence in a person injured at a railroad crossing, by a passing train, will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the whistle, as required by law. In that case, as the facts are stated in the opinion of the court, there was nothing whatever to excuse the injured party both from seeing and hearing the approaching train; while riding for about a mile parallel with the track and in plain view, he would seem to have closed his eyes and ears, and to have driven across or upon the track as a train was approaching. An injury received under such circumstances, the court held to be the result of his own reckless indifference, for which he could not recover against the railroad company whose train had caused it.

In the case of Newson *v.* N. Y. Central (*supra*), the finding of the jury in favor of the plaintiff was sustained, although it appeared that the deceased drove and remained with his horses in a dangerous place; that he had a previous difficulty with his horses at the same spot, in the earlier part of the same day,

and that he was warned by the flag-man that it was dangerous, and that he must not remain there with his horses. It appeared, further, that he was at the point designated by the defendants for the business in which he was engaged, that of receiving gravel from the cars, and the court held that it was a plain duty of the defendants not to expose him to danger while there, and that it did not lie with them to say that he was guilty of negligence in going there. It was not absolutely necessary, the court say, that the defendants' cars should have been run so near to his horses, and they held that such running was a clear act of negligence, for which the company was liable. I think this case holds that the question of the negligence of the deceased is not an isolated question, but is mixed with, and depends for its solution, in some manner, upon the question and degree of the defendants' negligence.

Brown *v.* The N. Y. C. R. R. (*supra*), was an action brought by the plaintiff to recover damages for injuries sustained by the plaintiff, by a collision of the defendants' cars with a stage coach in which she was a passenger. The view of the track was so much obstructed by houses and trees that a train approaching the village of Albion could not be seen until the traveler was within a few rods of the track. The driver heard the train approaching and stopped his horses. As it was passing, he started up toward the track, when a single car, separate from anything else, also came by. He again stopped, waited till it passed, and again started up. His horses had now reached the rails, when he saw still other cars approaching from the same direction. He whipped his horses with the intention of crossing before they reached him, but his hind wheels were struck, the coach upset and the plaintiff's injuries received. The separate cars following each other so rapidly, was the result of what is called a running switch, for the purpose of leaving one car out of the train. The defendants' claimed that, upon the undisputed facts, the plaintiff's driver was negligent and that she could not recover. The court held that upon these facts it was not error to leave it to the jury to say whether the driver was negligent; that it was for them to say whether he could more safely have drawn back than whipped up; that, under such circumstances, the party who put

him in jeopardy is responsible, and not he, if he mistook the safest means of escape. On the question of negligence, in not having seen the cars approaching, the court say that that was also for the jury. He had seen a train pass and had waited for it. He had also waited for a single car to pass. His eye followed them and "was he bound to suspect that more were coming, and to be on the look-out for them? I think it is asking too much to say that it was negligence, as a matter of law, not to have anticipated that they were following. The signals of the train had told him where the danger was, but gave no warning of unsignalled danger to follow." This authority also connects the question of the plaintiff's negligence with the acts and omissions of the defendants and their agents.

In the case of Wilds, it appeared that the deceased drove his horses upon a railroad where it crossed the street, the bell rang and the whistle sounded; a flag-man stood in the center of the street waiving his flag; some persons hallooed to him, and others tried to seize and stop his horses. He saw the engine coming, but raised his whip and attempted to pass before it. He failed, and was killed. This court ruled, as a matter of law, that no action would lie by his administratrix against the railroad company, on the ground that the exercise of ordinary discretion and prudence by the deceased would have discovered the advance of the train, and would have effectually preserved him from danger.

The Pennsylvania case decides that it is the duty of a traveler approaching a railroad crossing to look along the line of the railroad and see if any train is coming, and that if he failed to take such precaution it was more than evidence of negligence—it was negligence itself, and that the jury should have been so charged.

Did the facts, as I have collated them, in the present case, exhibit necessarily an absence of that ordinary prudence and discretion, or was there such room for question as that the case should have been left to the determination of the jury? The question of negligence is usually one of fact for the jury. (2 *Starkie on Ev.*, 973.) What constitutes negligence is a pure question of fact for the jury to decide. (*Ang. on Car.*, §§ 7,

16, &c.; *Story Bailm.*, § 11; *Greenl. Ev.*, § 48.) And it does not follow, necessarily, where there is no conflict of evidence, that the court is to decide the issue. (*Ireland* v. *Oswego R. R. Co.*, 13 *N. Y.*, 533; *Oldfield* v. *N. Y. and H. R. Co.*, 14 *id.*, 310.) What constitutes negligence in a particular case is generally a question for the jury, and not for the court, because negligence is want of ordinary care (49 *Penn.*, *supra*). These authorities are not in conflict with those which hold that, in certain cases, the courts rule the question as one of law, as where the evidence so clearly shows the want of prudence and discretion that there can be nothing for the jury to pass upon. Assuming that the conduct of the deceased, on the occasion in question, indicated negligence on his part, there are still some considerations to be noticed. The first is this: when the deceased started northerly from the tavern, and when he turned westwardly, toward the track, his eye would have covered the track for a distance of thirty rods. This was as far as he could see upon the railroad, and I think he was bound to survey this space. As I have already stated, this train, moving at forty miles per hour, would have passed over this thirty rods in eight and one-half seconds. Now, I think it was for the jury to say whether he had not found, by observation, that the track was clear, so that he could safely pass over it, and that the train came over this space and came upon him while he was passing over the space covered by the station-house, and where his view of the road was obstructed. The jury would be quite competent to say whether, at the moderate rate at which he was going, this inference might fairly have been drawn, and the conclusion thus reached, that it was not his own want of attention that produced the catastrophe. I think it should have been left to them upon that view.

Another consideration arises upon the point, whether it was entirely certain that the deceased understood, or was bound to have understood, the meaning of the shouts, the motions and gestures that were made to him. The ferry-boat was ready, his comrades had reached it, and were detaining it for him, and his crossing the river was the prominent idea in his mind. One man was on the west side of the track, which was nearest to the ferry, making gestures and motions, and others upon the

east side were also shouting and making motions. It is possible that the deceased may have misinterpreted these attentions, and understood them as designed to hurry him on to reach the boat, and this, too, with the exercise of ordinary prudence and discretion.

A third consideration, and which affects those I have already mentioned, and is to be considered in connection with them, was the absence of a flag-man, when the deceased attempted to cross the track. A man had usually been stationed there, to warn off travelers by his flag, when there was danger from an approaching train. The deceased was for many years accustomed to travel the road and to cross at this point. How far, then, the knowledge of the deceased extended as to this practice, whether he looked for the flag, and, not finding it exhibited as usual, relied upon its absence as evidence that the track was clear, and that he could safely cross, whether it was prudent and discreet in him to rely upon its absence, or whether he was still bound to exercise other precautions, and to take other means to satisfy himself that no train was at hand, whether his construction of the shouts, gestures and motions was to be affected by this absence of the flag and his knowledge of it, and its effect upon his examination of the road, were, I think, questions that should have been submitted to the jury. Without intending an intimation that the jury should or would have found in accordance with these suggestions, and intending to observe the principles laid down in Wilds and Steeves heretofore cited, I think an error was made in withdrawing the case entirely from the consideration of the jury. There should be a reversal of the judgment of the General Term, and a new trial ordered.

Judgment reversed, and new trial ordered.

FABER *against* FABER.

Supreme Court, First District, Special Term; June, 1867.

TRADE MARKS.—INJUNCTION.

The court will not enjoin a defendant from using his own name in the prosecution of a manufacturing business, because it is similar to that of a rival manufacturer in the same business. Any injury which one manufacturer may suffer by competition of other persons of the same name, from the use of such name merely, is without remedy under the law of trade marks.

What mode of putting up and selling pencils, singly or in quantities, will be deemed an imitation of the method of a prior manufacturer, and a violation of his trade mark—considered.

Motion for an injunction.

This action was brought by John Lother Faber, the manufacturer of the article known as the "A. W. Faber" lead pencil, against John H. Faber, and his agent in this country, J. S. Frankenthal, for an injunction and damages for violation of the trade mark claimed by the plaintiff.

The plaintiff resides and carries on the manufacture of pencils at Stein, and the defendant J. H. Faber, at Schweinaw; both of which places are near Nuremberg, Germany. At and near Nuremberg are many other similar manufacturers of lead pencils.

For the defence, it was contended that the plaintiff had no trade mark in the name "Faber;" and that the method and style in which the pencils were manufactured and put up, the kind of wrappers, labels, &c., used, were not peculiar to the plaintiff, but were such as were generally employed by the manufacturers at Nuremberg.

George De Forrest Lord, for the motion.

Cornelius A. Runker, opposed.

SUTHERLAND, J.—It is unfortunate for the plaintiff that he and the defendant, J. H. Faber, are both manufacturers of lead pencils at or near the same place in Germany, and that both have the same name as Faber, for it is easy to see this circumstance may have been and may be an injury to the plaintiff; but the defendant, Faber, has a right to put or stamp his own name in gold, gilt or other letters, on his pencils, and on the bands, wrappers, or covers in which they are put up as described in the complaint, and any injury which the plaintiff has suffered or may suffer by such use of the defendant Faber's name merely, must be viewed as an injury without a remedy.

The plaintiff certainly cannot claim the exclusive right to manufacture lead pencils for the American market, or the exclusive right to make them round, and to cover or polish them with black varnish, or stamp gilt or gold numerals upon them to designate certain qualities.

It is plain to me that the plaintiff has no right to complain of the form or finish of the defendant J. H. Faber's pencils, or of any mark or stamp upon them, viewed singly and out of their market bands or inclosures. There is nothing but the name of the maker stamped upon the pencils, viewed singly, calculated to deceive the purchaser of a single pencil or of any number less than a dozen, and the maker had the right to put his own name on his own pencils.

Nor can I see upon what ground the plaintiff can complain of the manner in which the defendant Faber's pencils are put up for the wholesale market. The plaintiff certainly has no right ~~to~~ the exclusive use of a particular colored paper or kind of paper for covering or inclosing his pencils by the gross in a book form, or any other particular form. The defendant Faber, has the right to put his name on the paper envelopes or wrappers of his gross packages; and considering how conspicuous his name is on these envelopes or wrapper, I cannot see how any wholesale purchaser, knowing that the plaintiff Faber, and the defendant Faber, both manufactured pencils, would be likely to be deceived by the gross envelopes or wrappers and purchase the defendant's pencils by the gross for the plaintiff's; especially as it appears from the defendant

Frankenthal's answer and affidavit, that all the manufacturers of lead pencils at Nuremberg, to the number of twenty or more, put up their pencils by the dozen and by the gross in substantially the same manner, using substantially the same color and kind of paper for the bands and for the outside gross envelopes or wrappers, with substantially the same devices, numerals and words (with the exception of maker's name) stamped or imprinted on them. As to the bands or wrappers of blank glazed paper in which the dozen and the ten dozen are inclosed or wrapped before the gross are put up in the book form; considering the explanations of the answer and affidavit of the defendant Frankenthal, as to the universal use by pencil manufacturers of the words "Crayons Polygrades," and "Pour Dessiri, Architecture, Bureau," &c., &c., on such bands or wrappers, I cannot see how the plaintiff can complain of their use by the defendant Faber. Besides, these words and the gilt parallelogram and ornamental work, device, or design surrounding them, and the maker's name, cannot deceive or mislead any purchasers by the dozen packages or bundles, and I can hardly think, considering the conspicuous manner in which the maker's name is put in gold or gilt letters on these bands that they are likely to deceive any such purchasers who know that there are two "Fabers" who manufacture pencils.

I would remark, too, that it would have been better for the plaintiff to have resorted to the courts of his own country to protect his rights whatever they may be.

Upon the whole I am of the opinion that the motion to continue the temporary injunction should be denied, and that the temporary injunction which was granted should be dissolved, with $10 costs to the defendant Frankenthal, to abide the event of the action.

CHAMBERLAIN *against* CHOLES

Court of Appeals; January, 1867.

WRIT OF ASSISTANCE.—PRACTICE ON VACATING.

The general rule is that when a judgment order or decree has been reversed or vacated, restitution will be made of all property and rights which have been lost by reason of it.

The case of vacating a writ of assistance forms no exception to this rule. The order which vacated it should make provision for re-instating any one who may have been dispossessed under the vacated writ, whether such party shows title to the possession or not.

An order denying an application, of a party who has been dispossessed from real property under a writ of assistance which has since been vacated, to be restored to the possession, is appealable.

Appeal from an order.

This action was brought by William Chamberlain against Young, Choles, and others, to foreclose a mortgage on certain real estate in Tarrytown.

At the time of filing the notice of *lis pendens*, Mrs. Ella Hall was in possession of the property, claiming title under a sale by the County Treasurer for taxes; but neither she nor any one under whom she claimed was made a party to the suit, nor had any notice of any of the proceedings therein.

The suit having proceeded to a decree of foreclosure and sale, a sale was had, pursuant to the decree, at which the plaintiff William Chamberlain, became the purchaser. Thereupon, he applied for and obtained a writ of assistance upon affidavit that Mrs. Hall had entered into possession since the filing of the notice of *lis pendens*, under some of the defendants in the action. The writ was immediately executed, and Mrs. Hall ejected from the premises. Mrs. Hall then, with other persons interested, moved to set aside the writ of assistance, which was granted with costs, but without giving any direction for restoring her to the premises. The moving parties there-

upon made a new motion to be restored, which was denied. From this decision they appealed to the general term, where the order appealed from was affirmed.

From this decision of the general term, the present appeal was taken.

The plaintiff moved to dismiss the appeal.

Amasa J. Parker, for the appellants.

J. H. Reynolds, for respondent.

MORGAN, J.—It will be unnecessary to notice several things which have crept into the case, as the question presented by the appeal depends upon principles entirely independent of the value of the property, or of the validity of the tax title under which the appellants now claim possession.

It is conceded that the plaintiff was not entitled to a writ of assistance, to put him in possession of the mortgaged premises, as against the appellants. It is also admitted that the appellants were ejected, and the plaintiff was put in possession by force of the writ. That writ having been set aside and vacated on application of the appellants, the question is, whether the appellants have a legal right to be put back into possession of the premises.

The application of the appellants to be restored to the possession of the premises was denied by the court below, upon the ground that the tax title under which they claimed was invalid. It was therefore considered unjust to oust the rightful owner, and put Mr. Kingsbury, or any one claiming under him, into possession.

The papers upon which the court granted the writ of assistance are not before us. It however appears that it was obtained without notice to the appellants, upon an affidavit of the plaintiff, that Mrs. Hall came into possession under the defendants, after the filing of notice of *lis pendens*. This fact, however, seems to have been disproved. But it is sufficient to say, that the writ of assistance was set aside by the court, and can no longer be resorted to in support of the plaintiff's possession. It must be assumed that the plaintiff had no right to such a writ as against these appellants, or the court upon

the hearing of the application might, I think, have refused to make an absolute order setting it aside. That would have been the ordinary course, if the court intended to give the plaintiff the benefit of its execution.

It is difficult to understand upon what theory the court set aside the writ, and at the same time granted to the plaintiff the full benefit of its execution. So far as the appellants are concerned, it is the same thing to them as though the court had refused their motion. If the appellants had a right to have the writ set aside, they, doubtless had a right to be placed in *statu quo*. It would be a mockery to set aside the writ, without restoring them to possession of the premises.

The appellants were ejected by force, under the authority of the court, which has since been withdrawn, and the question is, whether, as a matter of law, they should be restored.

The general rule is, that when judgment, order or decree has been reversed or vacated, restitution will be made of all property and rights which have been lost by reason of such erroneous judgment, order or decree. The case at bar furnishes no exception to the rule.

In *Exp.* Reynolds (1 *Cai.*, 500), the Supreme Court awarded restitution to be made to Reynolds, who was turned out of possession by mistake in executing a writ of possession against him after judgment, he being in possession prior to the commencement of an ejectment suit to which he was not a party. To the same effect is the case of Withers *v.* Harris (2 *Ld. Raym.*, 806), where the court, upon setting aside the writ of possession, awarded restitution.

But the case of *Doe dem.*, Stephens *v.* Lord (7 *Ad. & E.*, 610), is still more to the point. The lessor of the plaintiff, who was mortgagee of the premises, obtained judgment and took out a writ of possession, under which the sheriff gave him possession. The court afterwad set aside the writ for irregularity, without ordering restitution. Thereupon the defendant obtained a rule calling on the lessor of the plaintiff to show cause why a writ of restitution should not issue to the sheriff, commanding him to restore the possession to the defendant. The lessor of the plaintiff refused to give up possession, alleging that he was entitled to retain the lands as mortgagee, and by

virtue of the judgment, Lord Denman, Chief Justice, said that on principle the lessor of the plaintiff could not be allowed to retain possession. As he had been enabled to obtain it with an appearance of authority from the court, to which he was not entitled, he ought not to keep the possession. All the judges concurring, an order was made that the possession be restored to the defendant.

The court will not, in such a case, stop and inquire into the validity of the respective titles. The plaintiff having title, may doubtless enter into possession of the premises, if he finds the possession empty, but he must take care that he does not enter with force. The law is very careful not to permit one man to acquire of another the possession of property by his own illegal act. (Curtis *v.* Hubbard, 7 *Hill*, 437.) Certainly the court will not permit the owner himself to make an improper use of its authority to expel a party who is in peaceable possession of real estate. And it may be added, that there is no other way for the court to vindicate its authority in such a case, except to award restitution.

It is claimed, however, that the order in question is not appealable. This claim is based upon the theory that it was a mere matter of practice whether the court would award restitution or not. But I think it very clear that the decision affects a substantial right, and involves a very important principle in the administration of justice. Although it may be true that Mrs. Hall has no title upon which she could defend her possession as against the plaintiff, she has a clear right to be protected in that possession until she is removed from it by due process of law. The possession itself is *prima facie* evidence of title, and she cannot be deprived of it without due process of law. The process having been withdrawn by which she was turned out of possession, it is a matter of course to restore her to that possession.

The order appealed from should be reversed, with costs in this and the supreme court, and an order granted restoring her to the possession of the premises.

Order accordingly.

BALLOUHEY *against* CADOT.

New York Common Pleas, Special Term; December, 1866.

ARREST.—SUFFICIENCY OF AFFIDAVIT.—MOTION TO DISCHARGE.

A defendant who has appeared generally in an action cannot afterwards avail himself, on a motion to vacate an order of arrest, of an objection that the christian names of the plaintiffs are not stated in the papers on which the order of arrest was obtained.

On motion to vacate an order of arrest made upon the original papers only, if the necessary facts are positively sworn to in the plaintiff's affidavit, and if deponent can have had knowledge of them, the court will not vacate the order on the ground that the statements which it contains were probably not within his knowledge.

If defendant in an action for conversion moves to vacate an order of arrest granted upon an affidavit averring a demand of the property from him, it is for him to show that timely objection to the authority of the agent making the demand, was made; or that the defendant had rightfully a lien upon the property at the time of demand, if he relies upon either of those facts as an objection to the validity of it.

Motion to discharge an order of arrest.

This action was brought by "Ballouhey & Fouillet" against Auguste Cadot, to recover for conversion of property of the plaintiffs, who were glass-ware manufacturers at La Rochelle, France. The defendant was arrested upon an order holding him to bail in the sum of $35,000; which order he now moved to vacate.

E. B. Morel, John B. Fogarty and *C. L. Spilthorn*, for the motion.

Coudert Brothers, opposed.

CARDOZO, J.—The omission to insert the christian names of the plaintiffs is at most an irregularity. But even if that omission rendered the process void, the defendant could not avail

himself of it after his general appearance in the action. (Fixbey *v.* Mitchell, 7 *Cow.*, 366.) Under our broad powers of amendment, as the papers already show that the plaintiffs are the persons who compose the firm of Ballouhey & Co., manufacturers of glass-ware at La Rochelle, France, in furtherance of justice there should be leave granted to amend by inserting the christian names of the persons who compose that firm.

The other objections raised by the defendant do not constitute any ground for vacating the order of arrest. It is insisted that many of the statements of the affidavit could not be within the knowledge of deponent. I do not see that this is necessarily so. The deponent swears positively to them, and as the facts are conceded to be as stated by him, by reason of the omission of the defendant to present any affidavits on his part, and as I can very well see how the deponent may have the knowledge of the facts which he asserts, I think this point has no force.

The other objections raised are:

1. That the affidavit does not show that when the deponent demanded the property from the defendant, any written authority was exhibited.

2. That it does not appear that any tender was made to the defendant.

A third point to the effect that the affidavit does not show, independent of those objections, any cause of action, was taken. But a careful reading of the paper is all that is necessary to show that that is unfounded, if the two points specified be untenable.

As to those two objections, it is enough to say that the demand, without production of the agent's authority, would be perfectly good, unless that objection were taken at the time the demand was made. (Holbrook *v.* Wight, 24 *Wend.*, 169; Tuttle *v.* Gladding, 2 *Smith*, 158; *Dunl. Paley Ag.*, 347.) And if that were the fact, the defendant must show it.

But it is said that it does not appear that any tender was made. It may be answered—nor does it appear that there was any lien to discharge. The defendant of course had the right to retain the property until any amount for which he was entitled to a lien was paid. But how can the court say that

any such amount was unpaid? If there existed any demand for which the defendant had a lien, he must show it; and as he has not done so, I must assume that there was no unpaid claim for which he was entitled to a lien.

The defendant's motion must therefore be denied, with leave to renew it on affidavits, and with leave to the plaintiffs to amend the summons and papers by inserting their christian names. And as the plaintiffs committed an irregularity, and the defendant fails in his motion, neither party should have costs against the other, either as a condition of allowing the plaintiffs to amend or of permitting the defendant to renew his application.

Ordered accordingly.

BROOKS *against* SCHULTZ.

New York Superior Court, General Term; January, 1867.

TAKING TESTIMONY FOR MOTION.—POWERS OF REFEREE.

Where the deposition of a witness is taken under an order pursuant to the statute, for his examination before a referee, the adverse party is entitled to notice of the examination, and may attend and cross-examine.

History and objects of the statute authorizing the compulsory examination of a witness whose testimony is required for the purposes of a motion,—stated.

It is not irregular for a referee to whom it is referred to take the testimony of a witness, to put questions in the course of the examination; no unfairness or intent to favor either party at the expense of the other being shown.

A motion to vacate an order for examination of a witness for irregularity, in that it was granted without notice, must specify that ground of irregularity, otherwise it cannot be urged upon the hearing.

Appeal from an order.

This action was brought by James Brooks against Jackson S. Schultz, and others, composing the Metropolitan Board of

Health, and for the purpose of procuring an injunction against the proposed action of the Board.

A preliminary injunction was obtained, *ex parte*, on numerous affidavits. The defendants, on an affidavit showing that they desired to move to vacate the injunction, that they had requested the affiants, on the part of the plaintiff, to make affidavits in their behalf, which they had declined to do, and that they desired to procure their testimony to be used on a motion, obtained, *ex parte*, an order for the affiants to appear before a referee and be examined. At the examination before the referee the plaintiff's counsel appeared. The examinations were conducted by the defendants' attorney, who questioned the witnesses—except that at one hearing the referee himself put the questions. Upon affidavits setting forth these facts and alleging also that the original order for an examination had never been entered, that the referee named was in defendants' employ, and that his mode of conducting the examination was unjust, plaintiff obtained an order to show cause why the order appointing the referee should not be set aside on the ground of irregularity. At the hearing, the allegations of misconduct on the part of the referee were denied, and the order was shown to have been duly entered, but after the decision exonerating him, the defendants voluntarily proposed that another referee be substituted. Justice ROBERTSON denied the motion to vacate the order; and the plaintiff now appealed from this order to the general term.

James C. Carter, for the appellant.

George Bliss, jr., for respondents.

*By the Court.**—ROBERTSON, C. J.—On the argument of the appeal in this case, as well as on the argument before me at special term, the counsel on both sides took for granted that an order made, *ex parte*, to appoint a referee to examine witnesses for the purpose of using their examination on a motion, was regular; that the adverse party was entitled to no notice of the examination, and if he attended could only do so to

* Present—ROBERTSON, Ch. J., and BARBOUR and GARVIN, JJ.

watch the proceedings, and take advantage of any unfairness or irregularity in conducting the examination. The learned counsel for the plaintiffs, on such assumption directed his arguments mainly against the consequences of an indiscreet grant of such a power, and the danger of its abuse. He assumed that the only check upon evils which he vividly and minutely portrayed as resulting from such grant lay in an application, as in cases of other *ex parte* orders, to revoke it as indiscreetly given, and in other applications from time to time to regulate any disorders accruing in the exercise of such authority. He also found in the possible occurrence of such supposed evils, a limitation upon the discretion of the court in granting the order which is not expressly stated in the provision under which it was granted. (*Code*, § 401.) The limitation so grafted upon such provision was a restriction of the exercise of the authority to taking the testimony of witnesses respecting the main facts involved in a motion, to the exclusion of any facts merely tending to qualify or contradict any previous voluntary statement made by such witnesses, under oath, for the adverse party. This was based upon the assumption that the only defect intended to be remedied by the provision of the code permitting such a proceeding (§ 401), was an inability to procure the deposition of a witness to such main facts when he knew them; while the evil of wholesale statements made by willing witnesses of such main facts in favor of one party, without any possibility of showing by them qualifying circumstances, although entirely within the knowledge of the same witnesses, or establishing their ignorance or prejudice, would remain unabated; in other words, that the pleasure of the witness, not the authority of law, should determine how much of the truth should be furnished by witnesses in disposing of the rights of parties. No such distinction is apparent in the language of the provision, which is broad enough to redress such evil as well as supply such defect. Nor is there any good reason for such distinction or for supposing that it was intended to be recognized by the original provision adopted in 1830 (*2 R. S.*, 554, §§ 24, 25), by the revisers of the statutes.

Prior to the adoption of such provision in the Revised Statutes, it had been settled by the case of Bacon *v.* Magee (7

Cow., 515), that the supreme court could not coerce the making of an affidavit to be used on a motion. The learned reporter suggested in a note to that case (p. 517, n.a.), that the necessary testimony could be obtained on a *feigned issue*. The revisers in their notes to the two sections containing such provision, after referring to such case, say: "There are now no provisions of law to compel depositions *in such cases*, and the only mode in which testimony can be compelled is to award a feigned issue; *a tedious and expensive proceeding, not at all adapted to the exigency of those cases* to which the preceding sections are applicable." It is very evident therefore that the revisers intended by such sections to accomplish all that a feigned issue in the way of obtaining testimony, by means more adapted to *the exigency*, and with *less delay and expense*. This would clearly not be done, if the duties of the Commissioners appointed under such provision were confined to simply swearing a witness to a prepared affidavit, or taking down his answers to questions on one side and leaving the other to make a new application to the court for another commission to examine the witness, in order to procure statements qualifying those made by him on such first examination. Certainly such a proceeding could have little in common with a trial, such as that of a feigned issue, and would admit the evil of the private preparation of affidavits, by excluding the adverse party and his counsel from being present at the examination, unless he accidentally acquired knowledge of it.

The law, it is true, has not always been so apprehensive of evils likely to arise from an *ex parte* grant of authority to examine witnesses, without notice either to them or any one interested to prevent such examination or to intervene in it, or so chary of the tenor or fearful of the danger to witnesses by such examination of them, without such prior hearing, and in the absence of all persons adversly interested, as in all cases to require such notice or the presence of parties having adverse interests.

A conditional examination of a witness may be ordered without hearing the adverse party (2 *R. S.*, 392, § 23), which is in the discretion of the judge ordering it. But the compulsory examination of a person having property of or indebted to a

judgment debtor may be had without notice to the debtor (*Code*, § 294; Sherwood *v.* Buffalo & N. Y. C. R. R. Co., 12 *How.*, 137), as may also that of a witness to a deed on whose testimony so taken, it may be recorded or read in evidence on a trial, and neither the grantor nor any one else is entitled to notice (2 *R. S.*, 758, §§ 13, 14). Every imaginable evil likely to arise either from an *ex parte* grant of a right to examine a witness for a motion or from his examination, without the presence of any one having an interest adverse to the examining party, could equally well occur in such licensed cases. And indeed so far as the witness himself is concerned, even if the examination were confined to only the main facts involved in a motion, and did not extend to those explanatory of or qualifying a former deposition, the evil would be the same. Any restriction upon the application of such provision, or the grant or exercise of authority under it, is therefore not to be found in the mere apprehension of conceivable mischiefs.

Notice to the adverse party of the application for the appointment of a referee to take testimony, to be used on a motion, of course would remove all objections to the grant of such orders, as the court could, if it thought proper, limit the referee as to the matters to be enquired into. A discretion is vested by statute expressly in every judge of a court of record, who grants an order for the examination of a witness, who is sick, infirm, or about to leave the state, to be used on a trial, either to order the examination *ex parte* before himself or require the opposite party to shew cause why it should not be taken before a referee. The limit of time of the examination is to be twenty days or "*as much shorter as the exigency of the case* and *the residence of the adverse attorney will allow*, in order to afford sufficient opportunity to attend such examination." And it would appear that the opposite party might prove want of sufficient notice or of fairness in conducting the examinations to prevent the deposition from being read (Jackson *v.* Kent, 7 *Cow.*, 59), provided he appeared before the officer and objected on those grounds.

I apprehend that the provision of the Revised Statutes in reference to taking the testimony of witnesses for a motion, intended to leave the same discretion with the court either to

make the order absolutely in the first place, or an order to shew cause, or require notice of motion, being governed by the same considerations as in the conditional examination of a witness for a trial as to "the circumstances of the case requiring such examination to be made in order to do justice to the parties," and adopting the time of notice of the examination to the exigency of the case, and the distance of the residence of the attorney of the opposite party. After the order is made, even *ex parte*, no mere form of defects in the affidavits on which it was made, should prevent the depositions from being used (Sheldon *v.* Wood, 2 *Bosw.*, 268), more especially as neither such provision, nor that of the Code prescribes what such affidavits shall contain. The court, in the present case, may have seen in the affidavits themselves, on which the injunction was granted, the necessity of a cross-examination, and in the danger arising from delay in procuring it, reason for granting the order *ex parte*, particularly as the plaintiffs would be fully protected by attending the examination and re-examining the witnesses.

I have no doubt of the right of the plaintiff to notice of the examination, and to cross or re-examine the witnesses produced. Such notice is not expressly required, even by the statute for the conditional examination of witnesses (*ante*), when a referee is appointed, and yet it is held to be necessary (Wate *v.* Whitney, 7 *Cow.*, 69). There is no reason why such a case should be an exception to the general rule of the right of both parties to be present at any examination of witnesses whose testimony is to affect their interest in the action. The provision in the Revised Statutes (vol. 2, 554, § 25), requires a Commission to be issued, and such witness to testify before the Commissioner "in the same manner as before referees and with like effect." The modification of that in the Code (§ 401), requires him "to attend and make *an affidavit* before the referee, *the same as before a referee to whom it is referred to try an issue.*" This is of course not confined merely to administering an oath, since a *per diem* allowance is given to the referee for such service. It is true the term "affidavit" is used, but "deposition" had been employed just before, and both evidently meant the same thing as the "testimony" of

the witness, required by the provision of the Revised Statutes, to be *taken*. The referee acts as a judicial officer does on the trial of an issue, and not merely ministerially, he is bound to exclude irrelevant testimony and note objections and exceptions if made (Gibson *v.* Pearsall, 1 *E. D. Smith*, 90). The adverse party is not driven to a new application to re-examine the same witness, to prove circumstances tending to modify those testified to by him on such first examination, but may cross-examine him, indeed his neglect then to examine him would be a good ground for refusing such application. It is only in that way the witness could be examined *as on a trial before a referee or the trial of a feigned issue*, thereby avoiding delay and expense, which were declared by the revisers to be the original and primary object of such a provision.

Even if the order had been irregularly granted *ex parte* in this case, the plaintiffs cannot ask to have it set aside, because they have not specified such defect either in the order to show cause (*Gen. Rule*, 39), or in their motion papers (Blake *v.* Lacy, 6 *How.*, 108). There is no direct assertion in any of them that it was granted *ex parte* or without notice. Every word in the affidavit of the attorney for the plaintiffs may be true, and such notice may still have been given. The only technical irregularity suggested therein is the omission to file the affidavits in the clerk's office, and enter the order on his minutes which is disproved. Any such objection was also waived by the attendance of the attorneys for the plaintiffs, on two different days; on the examination, one of them, as stated by the attorney for the defendants, and not contradicted, on one occasion procuring modifications or amplifications of the statements of witnesses, and the other of them on another occasion leaving after stating that he would rely on the referee to take down the answers fairly. The attorneys for the plaintiffs knew at that time how the order was obtained and what it was, for one of them states in his affidavit, that it was obtained from a judge of *the court, based upon a pretended refusal of certain persons, who had made affidavits for the plaintiffs, to make affidavits for the defendants, necessary to be used on a motion, and appointed a referee* (whom he named) *to take the depositions of such persons*. The attorney for the defendants states in *his*

affidavit, in which he is uncontradicted, that on being asked several weeks previous, he informed one of the attorneys for the plaintiffs of the nature of the orders, in answer to an inquiry caused by a notice of them in public newspapers. The same attorney for the plaintiffs admits that he saw subpœnas served on witnesses which were signed by such referee as such, and yet he waited four days afterwards, two examinations occurring intermediately, before moving in the matter. The motion was evidently made too late on that ground. (Rushmore *v.* Hall, 12 *Abb.*, 420.)

The order to shew cause did not specify what part of the depositions were taken by the referee, by putting questions himself, so that if it were an irregularity, such part could be suppressed. The mere putting of questions by him was not an irregularity, on the contrary, in many cases it would often be more proper to have it so done. The circumstances under which he did it are fully explained, and although he did so, it was evidently not so done merely to favor either party, except to facilitate the writing of the deposition. If he had refused to put questions for the other side, there might be grounds for charging partiality. If judicial officers are to be arraigned for putting questions favorable to either side, it would deprive them of the power of putting any. It is very evident the charge of the referee was made with the consent of the defendants to remove all suspicions of unfairness, and not upon the ground that he was convicted of partizanship, since costs were given on the denial of the motion.

The orders appealed from should therefore be affirmed with costs.

KENNEDY *against* THORP.

New York Common Pleas; June, 1867.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—EVIDENCE OF FRAUD.—RIGHTS OF RECEIVER.

In an action by a receiver appointed in supplementary proceedings instituted upon a judgment recovered in the common pleas, the complaint did not

state that a transcript of the judgment had been docketed in the office of the county clerk. The defendant, however, without interposing a demurrer went to trial upon the merits, and the proof then showed that the judgment-debtor owned no real property.

Held: 1. That it was not necessary that the affidavit to obtain an order for examination should show that a transcript had been filed in the office of the county clerk.

2. That the defect, if it were one, might be remedied by amendment.

The cases arising upon judgments obtained in the district courts of the city of New York distinguished.

Where it appears that just before making an assignment for the benefit of creditors, the assignor bought goods largely, representing himself to be solvent, the assignment will be set aside in favor of a receiver appointed in supplementary proceedings.

The purchase of goods accompanied by such representations indicate a scheme of fraud of which the assignment will be deemed a part.

The receiver is not estopped from proving the fraud by the fact that the judgment creditor who procured him to be appointed as in his own case waived the fraud by bringing an action for goods sold and delivered.

Appeal from a judgment upon trial by the court.

This action was brought by Felix B. B. Kennedy, as receiver of Waterman C. Bradley, against Gould H. Thorp, and Waterman C. Bradley. The facts out of which the action arose, were, that Bradley had made a general assignment in trust for the benefit of creditors to Thorp, almost immediately previous to which he had made extensive purchases of goods upon representations of solvency. The Glen Cove Starch Manufacturing Company recovered judgment against Bradley in the court of common pleas, which was docketed with the clerk of that court, and in supplementary proceedings upon which the plaintiff was appointed receiver. He then brought this action to set aside the assignment.

Upon the trial, it was objected among other things, that the affidavit in the supplementary proceedings, which resulted in the plaintiff's appointment, did not show that the judgment of the Glen Cove Starch Manufacturing Company was ever docketed in the county clerk's office.

The cause was tried before Judge CARDOZO, who rendered judgment for the plaintiff, from which the defendants now appeal.

The following opinion was rendered by Judge CARDOZO at the special term:

CARDOZO, J.—1. I am of the opinion that there is nothing on the face of the assignment which invalidates it.

2. The objection that the complaint does not show that the remedy at law has been exhausted, because it is not averred that the judgment was docketed in the county clerk's office, might have been good on demurrer; but as the defendants have seen fit to go to trial, and their own proof shows that the assignor had not any real estate, I think the pleadings should, under the Code, be conformed to the fact, by an allegation excusing the omission to docket the judgment in the county clerk's office, similar to the one suggested by the chancellor in the 11th of *Paige R.*, which, I think, would be sufficient to sustain the bill.

3. Upon careful reflection I am constrained to find, as a matter of fact, upon all the evidence, that the assignment is fraudulent.

That the purchases were made upon false representations, and with intent to dispose of the property for his own benefit; and that the assignment was executed in pursuance or execution of such intent. I think all the evidence received is competent, as bearing upon the intent with which the assignment was made.

4. There must be judgment for the plaintiff, and the assignee must account and pay over to the plaintiff, who will be authorized to pay the creditors whom he represents. A reference will be ordered to carry the judgment into effect.

D. M. Porter, for appellants.

William H. Dickinson, for respondents.

By the Court,—BRADY, J.—It was not necessary to state in the affidavit that a transcript of the judgment had been filed at the office of the county clerk.

The judgment, of which the supplementary proceedings were predicated, had been obtained in this court. The Code (sec. 292) does not make that a pre-requisite in such a case.

When the proceedings are founded upon a judgment obtained in a district court in this city, it is essential to jurisdiction. (Code, sec. 68.) The cases upon this question cited by the defendants' counsel related to judgments in justices courts, which affected only the personal property of the debtor, *ex proprio vigore*, and the judgments pronounced were based upon that construction. Were it otherwise, it is shown that the debtor had no real estate, and the amendment allowed by Judge CARDOZO remedied the defect.

The Glen Cove Starch Manufacturing Company could have proceeded against the defendant Bradley to recover the goods in specie, or their value, in an action founded upon the fraud alleged to have been committed, or they could waive the tort, affirm the sale, and sue as for goods sold and delivered. It is conceded that their judgment was recovered upon an alleged sale and delivery of the goods, and the right to proceed as for a tort was waived and merged. Although such was the legal result of the form of action adopted by them it would not have prevented them from assailing the assignment on the ground that it was made with intent to defraud creditors.

The gravamen of the two causes is entirely different. The fraudulent representations by which they were induced to sell their goods were proved for the purpose of showing an intent to accumulate property for a fraudulent purpose, in conjunction with similar transactions, but not by them as suitors, but by the receiver, who represents the interest of the creditors as well as those of the debtor, and who is a trustee for all parties. (Bostwick *v.* Berger, 10 *Abbott Pr.*, 197; Porter *v.* Williams, 5 *Seld.*, 142; The Chautauque County Bank *v.* White, 2 *Seld.*, 236.) This action cannot be regarded as commenced by the Glen Cove Starch Manufacturing Company. The receiver takes the property of the debtor if the assignment cannot be sustained, inasmuch as the assignee has no title to it or its proceeds. The fraudulent conveyance in such an action as this may be annulled, and the creditor permitted to proceed to a sale upon his execution, or the property sold and the proceeds applied to the payment of debts according to their legal or equitable priorities. (Cases, *supra.*)

It was the duty of the receiver, if the facts and circum-

stances warranted it, to essay to get the assets of the debtor by attacking an assignment which he believed was fraudulently made to hinder and delay the creditors from the collection of their debts. The plaintiff is, therefore, *rectus in curia.* There is no doubt that the assignor Bradley, made purchases when he was insolvent. He had a right to do so. It was not evidence, *per se,* of a fraudulent intent, though it was a fact to be considered with reference to the general design which he had in view. His false representations, however, were wholly unjustifiable. (Nichols *v.* Pumer, 18 *N. Y.*, 295; and 23 *N. Y.*, 264.)

It may also be said that he had a right to make an assignment, preferring creditors; but, nevertheless, the exercise of both rights may have been with the intent to defraud. A lawful act in itself may be done with a fraudulent intent, and the facts and circumstances surrounding the defendant militate much against his honesty. He not only purchased largely within a short time before he made an assignment, but obtained many of the goods bought, by representations as to his solvency, which were false. The greater part of the goods thus obtained were shipped, and the creditor prevented therefore from reclaiming them. His purchases within six weeks prior to the assignment, were more than enough to pay his confidential debts, but so little in excess as to justify the conclusion that his scheme was to get goods enough to protect that class of creditors, and then to assign.

This explanation of the causes of his failure I admit was plausible. He lost by stock operations and by the failure of his brokers, whose notes he had to take for the margin deposited with them, and his credit was seriously injured by the conduct of some of his creditors who, by offering his paper at a large discount, depreciated his ability to meet his engagements. These causes precipitated, he says, the assignment which he had not designed to make until almost immediately before it was executed. It appears, however, that his stock operations were based upon money which was not part of his capital, and that he had made gains though not sufficient to cover the losses and margins withheld.

These explanations, however, are not sufficient to remove

the effect of his extraordinary conduct in making the purchase he did by false statements. I should be much disposed to regard his assignment as honestly conceived, were it not for this element. It was that indeed which justified his creditors in assailing his credit, and when it was assailed, he could not defend it.

It is true that he says that he did not know that he was not solvent, but that cannot avail him. When inquired of on that subject in reference to a purchase on credit, he was bound to know it. If a man may be excused by a supposition or belief that what he says is true, under such circumstances, with all the means of knowledge at hand, and particularly when it relates to his own personal affairs, then the remedies for fraud accomplished would be valueless, and commercial transactions rendered very insecure in their results. The law does not, however, countenance such conduct. Whether a party misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what he does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. (1 *Story Eq.*, § 193.) This proposition was adopted by the court of appeals in Bennett *v.* Judson (21 *N. Y.*, 238).

The defendant Bradley, fraudulently obtained goods with the intention of transferring them or their proceeds for the purpose of securing a certain class of creditors to the exclusion of others, and the two things formed one general design. If he had returned to the sellers from whom his recent purchases were made, their goods, or some portion of the proceeds, his conduct would have secured a more favorable consideration, and an honest intent in assigning the rest of his assets might have been gathered from all the circumstances there disclosed.

I do not arrive at this conclusion entirely free from doubt, but I should entertain greater doubt of the propriety of upholding the assignment.

I think the judgment should be affirmed.

O'CONNER'S CASE.

Supreme Court; First District; General Term; February, 1867.

HABEAS CORPUS.—ENLISTMENT.—JURISDICTION OF STATE COURTS.

Under the Act of Congress of 1862-64, the courts of the States should not exercise jurisdiction to discharge men enlisted in the army of the United States.

Certiorari to review an order denying an application to discharge an enlisted soldier.

Owen O'Conner, the father of John O'Conner, sued out a writ of *habeas corpus* in December, 1866, directed to Major-General Butterfield, Superintendent of the general recruiting service of the United States, commanding him to produce the body of John O'Conner, appearing, by the petition of the said Owen, to be his son, enlisted into the service shortly before that time, under the age of twenty-one years; the said Owen being entitled to the custody and services of his son. General Butterfield made return to the writ, that the said John had been regularly enlisted into the army, and he annexed the enlistment papers of the said John, whereby it appeared that he enlisted at Boston, in the State of Mass., December 12, 1866; that he was then of the age of twenty-two years, born at Weymouth, Mass.; and that he was by occupation a laborer. To this statement he made oath on December 13, 1866, before a Lieutenant of the U. S. Artillery, who also certified to his inspection of the recruit; that he was sober when enlisted; that to the best of his belief, the recruit was of lawful age; that in accepting him the officer had observed the regulations governing the recruiting service. General Butterfield also returned that in pursuance of the directions of the Judge Ad-

vocate-General of the army, a copy of which, in writing, he also annexed, it was not his duty to produce the said recruit in court. He further declared that his denial of the jurisdiction of the court, and refusal to produce the recruit, was from a sense of official duty, and not from any disrespect or contempt of the court.

At the hearing before the judge who granted the writ, the petitioner made oath that the recruit was born in Ireland, January, 1849; that he would not be eighteen years of age until the 6th of January, 1867, and he was not eighteen years of age at the time of his enlistment; that he was supported by his father, the petitioner, for whom he worked and to whom he owed service; that he, the father, had not sold his services or consented to his enlistment.

This evidence was not disputed, except by the introduction of the enlistment papers and the oath of the recruit therein contained; but its admissibility was objected to on behalf of government.

The judge thereupon dismissed the writ of *habeas corpus;* and the proceedings were now brought up upon *certiorari* for a review of the judgment.

A. Loring Cushing, for the petitioner.

Asa Bird Gardiner (2d Lieut. U.S. Infantry), for respondent.

INGRAHAM, J.—In this case, while I am of the opinion that the judges of the State courts might have exercised jurisdiction prior to the passage of the act of 1862 and 1864, I am not clear that the exercise of that power remains. No doubt Congress might pass an act prohibiting the State judges from interfering with enlistments in the army or navy. If they possess that power, the enquiry arises, whether the provisions in those statutes do not virtually prohibit it. They provide for a mode of discharge by the Secretary of War, and they annex terms and conditions on which such discharges can be granted. These provisions may be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining them.

I am inclined also to yield to the opinions of the judges of the United States Courts in this district on this question, as the petitioner may apply to any of these judges on *habeas corpus* for relief.

At any rate it is unnecessary to send the case back to the judge who allowed the suit.

All the evidence was taken between the parties, and if the general term are of the opinion that the party should be discharged they can now order it. The judge below passed upon the evidence and denied the application. The general term can only reverse his decision and make the order he should have made if he was in error.

CLERKE, J.—I agree with Judge INGRAHAM in thinking that the Federal Government has by recent legislation assumed such jurisdiction in cases of kind, as to make it necessarily exclusive. This, I think, it has a constitutional right to do under the power given to it "to raise and support armies." (Const. of U. S., § 8, sub. 11.) Besides, this is a controversy to which the United States is a party, as much so as to an action in which a collector of a port is a party ostensibly, but the United States actually.

LEONARD, J. (dissenting).—The weight of authority in this State is decidedly that the jurisdiction of the State courts and judges is concurrent with that of the United States upon *habeas corpus*, in cases like the present, where the prisoner is not detained by the process of any court of the United States or any judge thereof, or the judgment of any court of the United States. (1 *Kent's Com.*, 400, 401; *In re* Stacy, 10 J. R., 328; *In re* Metzger, 1 *Barb.*, 248, EDMONDS, J.; *In re* Dobbs, 21 *How. P. R.*, 68, HOFFMAN, J.; *In re* Carlton, 7 *Cow. R.*, 471; *In re* Webb, 24 *How. P. R.*, 247, BROWN, J.) In this case the oath of the recruit was held to be conclusive against himself, but not against others, having the legal right to his services. To the same effect is the opinion of Judge BACON in the case of Beswick (25 *How. P. R.*, 149). The authority principally relied on to sustain the doctrine that this court has no authority to discharge, &c., on *habeas corpus*, is the case of

Abelman *v.* Booth (21 *How. U. S. R.*, 506), and the case of Hopson (34 *Barb.*, 34). In the latter case the opinion of Judge BACON is founded largely upon his understanding of the language of Judge TANEY in the case of Abelman *v.* Booth.

Let us examine that case for a moment and ascertain its extent as authority for the position claimed by the counsel for the government. The decision embraces two appeals affecting the same party. In the first case the prisoner was held upon process issued by a commissioner of the United States having the powers of a judge in the issuing of process for crime, and in the other upon conviction and sentence in a court of the United States for a crime. In each case a judge of a State court had assumed to discharge the prisoner because of the invalidity of a law of the United States under which the prisoner had been arrested in the one case and convicted in the other. The State judge had assumed to undo, or disregard, a legal act done by a commissioner acting as a judge under the authority of a law of the United States, conferring jurisdiction upon him to issue process in the one case; and the trial, conviction and sentence of the prisoner by a court of the United States in the other case. In both cases the law of the United States must have been held by the commissioner and judge of the United States to be valid. It is too plain for reasoning that a State judge would act in conflict with the judicial authority of the United States courts in attempting to discharge a prisoner held under such circumstances, and that the jurisdiction was not, therefore, concurrent. It did not require the learned argument of a profound judge to prove the conclusion to which the Supreme Court of the United States arrived in that case; but it was expedient that the highest authority should declare the rule necessary to be observed by those who were willing to hold, as judges of the State courts, that the process and judgment of the United States courts could not be set at nought. Whatever was said by Judge TANEY in that case was said with reference to the facts before him. When he denies the jurisdiction of the State Courts or judges to discharge on *habeas corpus* prisoners held by the authority of the laws of the United States, he includes only such cases as have been passed upon in some form, judicially, either in granting process or rendering judg-

ment. A prisoner arrested by an officer of the United States on a criminal charge without any process, would not be in custody by authority of law so as to preclude a State court or judge from discharging him on *habeas corpus*. There is an entire absence of any analogy between the case of Abelman *v.* Booth, and that now before this court. It is time that its citation as an authority to uphold acts done without the authority of any law, State or national, should cease.

It is also urged by the counsel for the government that the acts of Congress of February, 1862, and of February and July, 1864 (12 and 13 *Stat. at L.*), confer upon the Secretary of War the authority to discharge enlisted minors, and that such authority ousts the State courts and judges of all jurisdiction to discharge them on *habeas corpus*. The authority derived from these acts for the discharge of minors from the army by the Secretary of War is not different from that previously existing, under which it was held by nearly every judge of this judicial district, that the authority of State courts and judges to discharge minors enlisted in the army without the consent of their parents or guardians, was concurrent with that of the Secretary of War. For a complete review of these statutes, as they existed in 1862, see opinion of Judge HOFFMAN, in the matter of Dobbs (21 *How. P. R.*, 68). The statutes of February and July, 1864, make it the duty of the Secretary of War to discharge any minor, enlisted under the age of eighteen years, without the consent of his parents or guardian, upon the repayment to the government of all bounties and advance pay, anything in the act thereby amended to the contrary notwithstanding. The act of July, 1862, provided that the oath of the recruit as to his age should be conclusive.

While this section was in force, the Secretary of War could not lawfully discharge a minor, who had taken such an oath, because it was made by law conclusive evidence as to his age. He may, since the amendment of July, 1864, discharge a minor enlisted under eighteen years of age, notwithstanding his oath.

It has been held quite recently by Judge NELSON, in cases before him on *habeas corpus*, that this change in the law does not extend the authority to the courts or judges to grant a dis-

charge to a minor enlisted under eighteen years of age. e courts," says Judge NELSON, "are not enabled judicially to vary, enlarge, or abridge the liabilities by any mandate or interposition acting upon the recruits in service, or officer in the army, in relation to their respective positions. The amendments of the law create no additional duties for the courts to perform, but in so far as any change is wrought upon the organization of military discipline it transfers wholly from the cognizance of the judiciary to the department of war the *exclusive charge* of the pecuniary rights and status of minor recruits in the army. Whatever relief or amelioration government will grant that class of the common soldiery, must be obtained under the two statutes above cited. Under the Constitution and laws of the land, Congress has complete jurisdiction over the whole subject matter involved in the relationship created by the contract of enlistment of the soldiers." Evidence was offered by the depositions of the parents of each of these minors that they were, respectively, under eighteen years of age at the time of enlistment. This evidence was excluded as wholly immaterial.

This decision is entitled to the gravest consideration. With the most profound respect for the very learned judge, I am unable to come to the same conclusion. Congress has forbidden the enlistment of a minor under eighteen years of age. It has directed one of the heads of departments to discharge any such recruit, notwithstanding the previous statute declaring that the oath of the recruit should be conclusive evidence of his age, on re-payment of bounties, advance pay, &c. Such an enlisted minor is unlawfully detained in the service. Why should not the courts or the authorized judges so declare and adjudge as well as the Secretary of War, following the same conditions which Congress has directed him to observe? It is not possible to suppose that judges will be less observant of the provisions of the law than the secretary. There is no inhibition upon the courts or judges from declaring that a recruit has been unlawfully enlisted, and is not for that reason lawfully detained in the army. Nor does the law contain any provision declaring that the authority to grant discharges in such cases shall be granted exclusively by the secretary. The

act of September 28, 1850, entitled "An Act making appropriations for the support of the army for the year ending June 1, 1851," provided (§ 5) "that the Secretary of War should order the discharge of any soldier enlisted under the age of twenty-one without the consent of his parent or guardian." The courts of this State held very generally that the concurrent duty also devolved on them to discharge minors, when enlisted, without the consent of parent or guardian; particularly was it so held in the first judicial district of this State, until the suspension of the writ of *habeas corpus* in August, 1863.

There is not any substantial difference in the provisions of the law of Congress now in force, in this respect, and those which then prevailed. The question is *still* whether the recruit is lawfully detained.

The statutes of this State are imperative upon the courts and judges to grant the writ for personal liberty whenever applied for in behalf of a person appearing by the petition to be unlawfully detained; and if no legal cause for such imprisonment or restraint be shown to discharge such party. (3 *R. S.*, 363, 367, §§ 21, 26, 30, 39.)

It appears to me that it is incumbent upon this court to follow the authority of the statutes and decisions of the State rather than the new and sole advice of one judge of the United States court, however much his opinion may be entitled to respect. If this court were subordinate to that court, the rule would be different. Should any tribunal, having appellate jurisdiction over this court, arrive at a different judgment, it would then be our duty to defer to superior authority. But till such time we should adhere consistently to the decisions of our tribunals. There is no sufficient reason for refusing the jurisdiction. It is true, it would be more convenient to do so, but the law and precedents of judicial authority in this State would be disregarded, and the captive could not make his wrongs heard, except through the Secretary of War, who, it may be assumed, has more important matters to demand his attention. In the present case it would be the duty of the Secretary, on the present proof, to discharge the recruit; and it cannot be doubted that he would do so, whenever in the pressure of his engagements the case of a private soldier, on

the application of his parents, or of himself, for a discharge on the ground of his minority, should be reached—a period, perhaps, as long as that of his term of enlistment.

There can be no sufficient reason in a time of profound peace why exclusive jurisdiction should be required for the Secretary of War, for the detention of a military recruit, enlisted at an age when the law requires him to be discharged by the Secretary, notwithstanding any oath he may have taken on the subject of his age.

Congress had the power to have conferred the authority exclusively upon the Secretary, but in my opinion they have not done so; and such a construction is not required by existing circumstances.

The recruit should be discharged upon the conditions prescribed by the statute of re-payment of bounties and advance pay, and returning the government clothing.

It is apparent that General Butterfield has not intended any disrespect of the court; but martial law no longer prevails, and the military, as before the war, are subordinate to law and order, and must obey the orders of the civil tribunals.

An order should be made reversing the order granted by the judge, directing the production of O'Conner, and that he be discharged on complying with conditions above mentioned.

Order appealed from affirmed.

VAN CLEVE *against* ABBATT.

New York Common Pleas, Special Term; January, 1867.

An appeal from a judgment under the Mechanics Lien Law stays only so much of the proceedings under the judgment, as a judge of the court below, or a judge of the appellate court, shall order to be so stayed, until the hearing of the appeal.

Under a judgment exempting property from a Mechanics Lien, the Lien may

be discharged of Record, notwithstanding an appeal, unless proceedings have been so stayed.

Motion for the discharge from record of certain mechanics liens.

This was an action or proceeding, under the Mechanics Lien Law, for the foreclosure of certain mechanics liens, on premises in the city of New York, of which the defendant Abbatt, was owner. An adjudication was had, and judgment was entered in favor of the owner, declaring the premises exempt from the liens. A notice of appeal from the judgment was then served by Van Cleve; but no order was made staying proceedings under the judgment. This motion was then made by the defendant Abbatt, for an order, directing that the liens be discharged of record.

Paddock & Cannon, for the motion.

J. W. Culver, and *Hammond & Romaine*, opposed.

BRADY, J.—The judgment, from which the plaintiff has appealed, declares certain liens, enumerated and described, to be invalid, either against the defendant Robert Abbatt, or the premises described in them. The effect of that judgment is to release the premises from the liens named, unless an appeal be taken and the proceedings stayed, either by security, or by order of the court in which the judgment was entered, or the appellate court. The appeal, taken by the plaintiff, is to the general term of this court, pursuant to the provisions of sections 7 and 8, of chapter 500, of the Laws of 1863. On reference to the sections named, we find (§ 7) that any party, aggrieved by *any decision*, may, within ten days after notice of the judgment or decree, appeal from such judgment, or any part thereof—such appeals to be heard and decided as in case of appeals from an order at special term. The decision mentioned means a judgment or decree, entered upon the proceedings contemplated by section 7, and the result of either a trial by jury, or before a referee, or the court without a jury. The effect of the appeal, when taken, which is initiated by a notice simply, is (§ 8) only

to stay so much of the proceedings, as a judge of either the court below or a judge of the appellate court shall order to be so stayed, until the hearing of such appeal; and on such terms, as to security or otherwise, as such court or judge may order. It is, perhaps, a general peculiarity of the act under consideration, that it is predicated, in its various features, on the certainty of the lienor's success—few of its provisions being devoted to the benefit of the owner, in express terms, even if he should be successful in defeating the asserted lien upon his premises.

The manner of discharging the liens, provided by section 10, illustrates this view. The fourth mode of discharging the lien is stated to be, "by a judgment, or docket of a judgment, exempting such property, after ten days, on proof of notice of such judgment; and that ten days have elapsed and no appeal has been taken therefrom." The defendant Abbatt, has a judgment, the effect of which is, to exempt his property from the liens which that judgment declares invalid; but he cannot avail himself of its advantages, because the plaintiff has appealed, as provided by section 7, if the language of section 10 is to be construed strictly. The Legislature undoubtedly intended to secure the lienor, and to make the thing built pay the cost of its erection; but some regard to the owner's right must have entered into the legislative element. The intent of that body is as much a part of the law, in the construction of a statute, as is the law itself. It must have been presumed that a judgment would, in some cases at least, be rendered in favor of the owner, and that, when such were the case, he was entitled to indemnity as well as the lienor. The 8th section must, therefore, be considered as applicable to all judgments entered in proceedings to foreclose a lien, whether for, or against, the owner; and the benefit of its provisions to enure as well to either party, leaving the court appellate or otherwise to determine what stay should be granted, under the circumstances of each particular case. The language of that section is general; such appeal shall only stay so much of the proceedings as a judge of the court below or appellate court shall order to be stayed, on such terms, as to security or otherwise, as such judge may order. It follows that the plaintiff, not

having procured a stay, cannot prevent the defendant Abbatt, from having the full benefit of his judgment.

The presumptions of law are all in his favor. He has succeeded in the proceeding, and, if the plaintiff wishes to continue his liens, which are a cloud upon the title, he must procure an order to stay proceedings. For these reasons, although the 10th section does not so provide in express terms, I think, that when the judgment exempts the property, the lien must be discharged, although an appeal has been taken, unless the operation of such judgment has been stayed.

I think, in judgments favorable to the owner, it would be the better practice to provide, not only that the liens are invalid, but, adopting the language of the statute, that the property is exempt from them, which will doubtless save, in some instances at least, the necessity of a further application to the court.

The motion must be granted.

Order accordingly.

GOODSELL *against* PHILLIPS.

Supreme Court, Sixth District; General Term, May, 1867.

SUBMISSION TO ARBITRATION.—SUBSCRIBING WITNESS.

Under the provisions of the Revised Statutes relative to the submission of controversies to arbitration, no *judgment* can be entered upon an award of arbitrators, unless the submission is proved by the affidavit of a subscribing witness. When therefore the submission is not attested by a subscribing witness, any judgment entered upon it is irregular, and should be set aside on motion.

An award founded upon an unattested submission may, however, be enforced by action.

The objection to the propriety of entering judgment upon an award founded

upon a submission unattested by a subscribing witness, is not waived by attending and proceeding before the arbitrators, pursuant to such submission.

Appeal by plaintiff from an order of the Broome special term, made in October, 1866, setting aside a judgment entered in favor of the plaintiff against the defendant, and the execution thereon.

The judgment in question, which was in favor of Daniel Goodsell, the plaintiff, against Reuben H. Phillips, the defendant, was entered on an award of arbitrators for $176 79 besides interest and costs. The award was dated February 13, 1866.

The submission of the matters in dispute between the parties to arbitrators, was dated the 26th day of January, 1866. It was signed and sealed by the parties, and a 5 cent revenue stamp was on the submission; but there was no subscribing witness thereto.

Two arbitrators were named in the submission, and it was provided therein, that the party in whose favor an award should be made might enter a judgment against the other as of the supreme court, the same as upon the report of a referee, with like costs to be taxed; and the arbitrators were required to make their decision in writing within ten days after a submission to them.

The submission also contained provisions for the appointment of a third arbitrator, and for proceedings to be had thereafter, in case the two named in the submission should not agree.

At a special term of the court held June 19, 1866, the plaintiff Goodsell, upon proof of the execution of the submission by the parties, and proof of the making and service of an award, and that a term of court had been held since the date of the publication of the award at which the defendant could have made application upon notice to the plaintiff to vacate, modify or correct the award in case he intended so to do, obtained an order, without notice to the defendant, for judgment against the defendant upon the award; and in pursuance of such order the plaintiff entered the judgment in question. This

judgment the defendant afterwards moved to set aside, which was granted, and the plaintiff now appealed.

J. J. Van Allen, for the motion.

J. McGuire, opposed.

By the Court,*—BALCOM, J.—The plaintiff was not entitled to enter a judgment against the defendant upon the award unless the statute authorised him to do it. A party can confess a judgment, which may be entered without action, provided he complies with the provisions of the code of procedure on the subject. (See Code, §§ 382 to 384.) A party cannot enter a judgment upon an award in his favor, unless the submission, pursuant to which it was made, be in conformity with the statute respecting arbitrations. When parties, by an instrument in writing, submit matters in dispute to the decision of arbitrators, they "may, in such submission, agree that a judgment of any court of law and of record, to be designated in such instrument, shall be rendered upon the award made pursuant to such submission." (3 *Rev. Stat.*, 5 *Ed.*, 855, § 1). But to entitle any award to be enforced by the entry of judgment thereon pursuant to the statutes on the subject, it must be in writing, subscribed by the arbitrators making the same, and attested by a subscribing witness. (*Id.*, 856, § 8). And no judgment can be entered on such award, under the statute, until the *submission*, pursuant to which it was made, be proved "by the affidavit of a subscribing witness thereto." (*Id.*, 856, § 9). The statute is, "upon such submission being proved by the affidavit of a subscribing witness thereto, and upon the award made in pursuance thereof being proved in like manner, or by the affidavit of the arbitrators, within one year after the making of the same, the court designated in such submission shall, by rule in open court, confirm such award, unless the same be vacated or modified, or a decision thereon be postponed, as herein provided." (*Id.*, § 9). "Upon such award being confirmed or modified, the court shall render judgment in favor of the party

*Present—MASON, BALCOM and BOARDMAN, J.J.

to whom any sum of money or damages shall have been awarded that he recover the same," &c. (*Id.*, 857, § 14). The submission in this case was not proved by the affidavit of a subscribing witness thereto; for there was no subscribing witness to it. The plaintiff could not comply with the statute respecting the proof of the submission, and therefore did not make a case that authorized the court to give him a judgment upon the award. The rule is, that the requirements of the statute must be strictly complied with to entitle a party to enter a judgment on an award without action. (Hollenback *v.* Fleming, 6 *Hill*, 303.)

But it is claimed by the plaintiff's counsel, that the defendant waived proof of the submission by the affidavit of a subscribing witness, by taking part in the proceedings before the two arbitrators named in the submission, knowing there was no subscribing witness to it; and by not moving to vacate, modify or correct the award as he might have done. This position is untenable; for an award might have been made, under the submission, that could have been enforced by action: and the defendant may have omitted to make such a motion under the belief that the award was valid, though no judgment could be recovered on it except by action. If he had had notice of the application for judgment upon the award, and had failed to object to a judgment being rendered on it against him, on the ground that there was no subscribing witness to the submission, &c., it is probable he would have waived that objection, so that a judgment against him could not have been reversed. (See Hollenback *v.* Fleming, *supra.*) But he did not have any notice of the application to the court for judgment on the award, and therefore did not waive the objection that the submission was not proved by the affidavit of a subscribing witness thereto by not opposing such application.

The plaintiff's counsel relies on the decisions in 12 *Wendell*, 212, and in Hughes *v.* Bywater (4 *Hill*, 551), as sustaining the regularity of the judgment in this case. But those decisions were made when judgments could be entered on warrants of attorney without special motion, and the stipulations in the submissions in those cases, were held to be the same thing as if they had expressly authorized the entry of judgment by

attorney. Now, judgments cannot be entered on warrants of attorney; but must be entered in the manner prescribed by the Code, or by some other statute, unless entered in actions which have been duly commenced.

Our conclusion is, that the judgment in this case was irregularly entered, for the reason that the submission was not proved in the manner prescribed by statute; and that the defendant could move to have it set aside for irregularity, because he did not have any notice of the plaintiff's application for judgment on the award. It is, therefore, unnecessary to decide the other questions, raised by the defendant's counsel, as to the invalidity of the award, because the appointment of the third arbitrator was not in writing, and because the award was made after the defendant's notice of revocation of the powers of the arbitrators, without giving him an opportunity to be heard before such third arbitrator. And we will not determine whether the defendant should have moved to vacate the award on those grounds, or whether he could move to set aside the judgment on those grounds, after omitting to move to vacate the award. It is sufficient for us to say the judgment was properly set aside on the ground that the submission was not proved in the manner prescribed by statute. The order setting aside the judgment and execution issued thereon should be affirmed with costs.

Order affirmed

THE PEOPLE, *ex rel*, BRUNETT *against* DUTCHER.

Supreme Court, Sixth District, General Term; July, 1867.

CONTEMPT.—DISOBEYING SUBPŒNA.—POWERS OF COUNTY JUDGE.

A county judge cannot punish for contempt, in refusing to obey a subpœna to appear and testify before him, which is issued from the Supreme Court, and tested in the name of one of its justices.

Nor can he punish for contempt, in refusing to attend pursuant to subpœna issued in his name, whether signed by him or not.

The proper method of obtaining the attendance of a witness before a county judge, upon a hearing in supplementary proceedings, is by a subpœna issued out of the court in which the judgment is obtained; and disobedience to such subpœna should be tried and punished by that court.

Appeals from two orders.

The relator, Elizabeth Brunett, obtained a judgment in the supreme court against John Dutcher, on which proceedings supplementary to execution were commenced before the county judge of Otsego, by whom it was ordered that the defendant appear before a referee to be examined concerning his property, and that the evidence of such party and of such witnesses as might be offered should be reported to said county judge. As a part of the proceedings on such reference, the relator's attorney issued a subpœna in due form, in the supreme court, tested in the name of Justice Balcom, and signed by the attorney and county clerk, directed to the two appellants, requiring them to appear at a time and place named, on such reference, to testify and give evidence therein; which subpœna was duly served upon the appellants and their fees paid. They did not attend, and the proper proof was made to authorize an attachment. At the same time a new subpœna was made out and signed by the relator's attorney and county clerk, substantially the same as the first, except that it was tested in the name of E. E. Ferry, county judge of Otsego county, but not signed by him, which was duly served upon each of the appellants, but they again made default; and upon due proofs made, the county judge of Otsego county issued an attachment against them, and upon the hearing thereon they were each held guilty of a contempt of court in not obeying said subpœna, and each ordered to pay a fine of $62 50, and stand committed, &c. These appeals were taken from these two orders.

E. M. Harris, for the appellants.

D. C. Bates, for the respondent.

By the Court.—BOARDMAN, J.—The sole question in this case

is that of jurisdiction. Had the county judge jurisdiction to punish as for a contempt the disobedience of these subpœnas? It is practically conceded, and is doubtless true, that he had no right to punish for disobeying the first subpœna, which was regularly issued from the supreme court, and tested in the name of one of its justices; it was a "contempt of the court out of which the subpœna issued," that is, the supreme court (3 *Rev. Stat.*, 5 *ed.*, 683, § 57). Such was the view taken of the case by the county judge, and he rests his conviction upon the second subpœna, tested in his own name, treating it as an order; citing sections 295 and 296 of the Code as his authority. Section 295 says that witnesses may be required to appear, &c., in the same manner as upon the trial of an issue; and section 296, that the witness may be required to attend before the judge or before a referee, &c. The manner in which witnesses are required to attend upon the trial of an issue is not by an order of the judge, it is only by subpœna, except in peculiar cases specially provided for by law.

It seems to me clear that the Code by those sections provides for witnesses being subpœnaed in the usual manner, with which the judge has nothing to do. I will not say that a judge may not order or summons a witness to appear before himself, or a referee, in these cases; but if such a power is recognized by the Code, I do not think the second subpœna can be held to be such order or summons. It is not signed by the judge or issued by his direction or authority. (Code, § 400.) In all orders made out of court (as this would be), the judge signs the order. That is the only evidence of its validity.

But I do not think such an order one of those provided for in section 302. There are various kinds of orders that may be made by the judge or referee in these proceedings, to which this section properly applies, but there is nothing which satisfies me that an order or summons for a witness may be issued by the judge. If he has no such power, then he had no jurisdiction to adjudge these parties in contempt. If he had the power, I think he did not exercise it, and the same result consequently follows. (2 *Abb. Pr.*, 82.)

I believe a subpœna is the true and proper process for procuring the attendance of witnesses; that it should issue out of

the court in which the judgment is obtained; and that any disobedience of such subpœna should be tried and punished by the court out of which the subpœna issued. (19 *How. Pr.*, 560, and cases cited; 3 *Rev. Stat.*, 5 *Ed.*, 849, § 1.)

The orders appealed from should be reversed with $10 costs in each case.

MASTERSON *against* SHORT.

New York Superior Court, Special Term; August, 1867.

INJUNCTION.—RESTRAINING NUISANCES.—POWERS OF NEW YORK COMMON COUNCIL.

An injunction cannot be granted upon the ground of nuisance, to restrain acts done in the lawful exercise of authority.

The Common Council of the city of New York have the power to establish and regulate stands for hackney-coaches in the streets and public places of the city; and persons keeping or occupying such stands, within the permission or license given by the Common Council, and who are not misusing the privilege given them thereby, cannot be restrained by injunction, on the ground of injury caused by their competition to the business interests of the plaintiff.

The fact that a plaintiff suffers a loss of profits in his trade by a competition in business set up by the defendant, cannot, ordinarily, be regarded as constituting special damage, such as will sustain an action.

It seems that a number of persons may be joined as defendants in an action to restrain their acts, on the ground of nuisance, where their acts are of the same general character, and depend upon the same claim of right, notwithstanding the acts of each one are distinct from those of the others, and the complaint contains no charge of combination.

Motion for an injunction.

This action was brought by William H. Masterson, and others, against Arthur Short, and others.

The plaintiffs were proprietors of a livery stable opposite the Central Park, in the city of New York; and the object of the action was to restrain the defendants from keeping hack-

ney-coaches at a public stand in front of their stables, in competition with their business. The defendants claimed the right to maintain their stand under a permission or license from the common council of the city, the validity of which constituted the principal question.

A. H. Reavey, for the motion.

Coleman & Shafer, opposed.

JONES, J.—This action can only be sustained on the ground that the act of the defendants in standing their carriages where they do, is a nuisance.

They stand their carriages in that place under the authority of an ordinance of the common council, establishing that portion of the street as a hackney-coach stand.

If the common council had authority to make such ordinance, and the defendants have not stepped beyond the limits of the authority conferred by the ordinance, then their acts cannot be a nuisance.

A nuisance cannot be predicated of the lawful exercise of authority. This is the proposition laid down by Judge DAVIS, in Davis *v.* The Mayor, &c., of New York. (15 *N. Y.* 506.) Its correctness is too palpable to need enforcement by argument.

This leads to a consideration of the power of the common council to establish hackney stands in the city.

The 14th section of the Montgomery Charter provides that the common council shall have full power to frame, constitute, ordain and establish such laws, statutes and ordinances as was to them shall seem good, useful or necessary for the good rule and government of all officers, ministers, artificers, citizens, inhabitants and residents of said city within the limits thereof, and for the further public good, common profit, trade and better government and rule of the said city.

Chancellor Kent, in his Commentaries on the Dongan and Montgomery Charter, says, in reference to this section: "These broad and latitudinary powers were given to be exercised with sound discretion and with a liberal spirit, commensurate with the growing wants and prosperity of a great commercial me-

tropolis. Though the charter would seem to contain a grant of ample powers sufficient for all the purposes of a well-ordered police, and for the good government of the city in its complicated concerns, yet the Legislature has been in the practice of granting more specific and detailed powers, sometimes on the application of the common council, and more frequently without it. These statutes are in general, made in aid and confirmation of the general corporate powers on the subject, and sometimes with the avowed wish and consent of the corporation, such as the laws relating to hackney-coaches, butchers, &c." Then, after referring to a number of statutory regulations, he proceeds: "Amidst such a multitude of statute regulations, it becomes difficult to know how far an ordinance of the council rests upon the authority of the charter, and how far on the authority of some special statute. When the latter exists the exercise of the power is of course to be referred to the statute as the more certain and paramount authority. The city ordinances sometimes act concurrently with and in aid of the statute power, though much more frequently the statute law comes in and carries out to a definite and precise extent the authority which lies dormant in the comprehensive powers of the charter. If we take up and run through the ordinances of 1833, now in force, we shall find many of them to be the exercise of charter powers simply; others are the exercise of charter and statute powers combined; and others again rest solely on the statute grant of authority. There is no doubt that when any of the ordinances alluded to cannot be referred to the grant of power by any express statute provisions, the general and unlimited grant of ordinance power in this section of the charter is sufficient to uphold and warrant it. The efficient checks against any abuse of such enlarged discretion are public opinion, the elective franchise, and the established principles of the constitution and of recognized common law. In addition to these checks, all corporations are liable to legal process in behalf of the state for non-user or mis-user of their rights and powers."

These views have not, it is true, the force of a decision of a court directly on the various points; but they are the expression of the opinion of a learned and able jurist, given in the

performance of a public duty, and as such entitled to great weight and consideration. The views thus expressed, seem, to me, to be correct, and as they are expressed with a legal acumen and pureness of diction not possessed by me, I have preferred to adopt his language to my own.

Among the ordinances of 1833, referred to by Chancellor Kent, is one establishing hackney-coach stands. It was certainly his opinion that such establishment was by sufficient power.

As, however, his attention may not have been particularly called to that subject, and his opinion may have been founded on the general view of the scope and effect of the charter powers without a close scrutiny of their effect on this particular subject, I will proceed to give that scrutiny:

The Seventh avenue was opened under the act of 1813. By the terms of this act it is held by the Mayor, Aldermen and Commonalty, "*in trust*, that the same be appropriated and kept open for, or as part of, a public street * * * in like manner as the other public streets * * * are and of right ought to be."

Under the general and broad charter-powers above referred to, the common council would have authority to establish such rules and ordinances relative to the regulation and use of the streets by citizens as are compatible with the trust upon which they hold it. It is to be used as a public street. Such use, then, as is recognized and declared by law, or long established custom, to be a proper and legitimate use of a public street, or which the sovereign power has vested in the common council the right and power to grant, may be authorized.

The system of hackney-coaches standing at designated places in the streets of a city grew out of the necessity of meeting the public demands. A demand arose in cities for means of transit from point to point other than by walking. As the city increased in extent of territory and became more populous the demand increased. This gave rise to a class of men who procured one or more vehicles, according to their means, and plied the streets for hire. It was soon found necessary to place these men under special police regulations, and as one of those regulations to assign certain places in the streets

where they might stand waiting for customers. Such regulation was necessary for the control of the hackmen, and for the convenience of the public. Its object was to prevent the hackmen from traveling with their empty vehicles in search of custom in the streets otherwise sufficiently crowded, and also to prevent their stopping and remaining for any considerable time at inconvenient places; but the great object was to have hacks standing at various points where the public would be most likely to want them, and where they would cause the least inconvenience to other vehicles or injury to the surrounding property.

The earliest record of hackney-coaches that I have been able to find in the English law is in 1654, when an act was passed limiting the number of hackney-coaches, and giving to the court of London the government and ordering thereof.

Subsequently, in the ninth year of the reign of Queen ANNE, an act was passed giving to commissioners of pavements power to make by-laws, which should be binding on hackney-coachmen.

Under this power the commissioners made regulations as to stands. Afterward, in the twelfth year of the reign of GEORGE III., in 1772, an act was passed reciting that the hackney-coaches frequently took their stands with coaches and chairs in crowded places, &c., and giving to certain commissioners power to direct and regulate at what places they should stand. Under this act the commissioners made an order directing a coachman not to stand in a certain place in which he had been accustomed to stand. This led to a litigation. The counsel for the coachman contended that he was standing according to the regulations made under the act of ANNE, and that the power given by the act of GEORGE III. did not authorize the commissioners named in that act to interfere with the stands previously established, but only to establish others. The counsel, on the other side, argued that the words of the statute of GEORGE III. were sufficiently comprehensive to authorize as well a discontinuance of stands already established as the establishment of new ones, and so the court held. The authority of the commissioners mentioned in the act of ANNE, to establish stands, under the general power conferred on

them to make by-laws which should be binding on hackney-coachmen, was not questioned or doubted by the respective counsel or by the court, but tacitly conceded.

Thus the law of England stood in 1774. By if the right of hackney-coachmen to use the public streets in their vocation as well to solicit passengers as to carry them, and the authority to control such use by the establishment of stands by a body on whom Parliament had conferred a general power to make by-laws binding on the hackney-coachmen, were fully recognized. When, then, in 1730, the crown of England granted to the city of New-York the charter known as the Montgomery Charter, by which, among other things, power was given to the common council to ordain and make such ordinances as to them should seem good or necessary for the good rule and government of the body corporate, and of all the officers, ministers, artificers, citizens, inhabitants and residents of said city, it then passed to the common council under its general grant of power the same authority to regulate hackney-coaches and establish coach-stands in the city of New York which the Crown was accustomed to delegate to certain bodies to be exercised in the city of London and other cities of Great Britain. This power has never been taken away by the legislature. On the contrary, it has been confirmed. By the act of 1813, the common council is authorized to regulate hackney-coaches and the owners and drivers thereof. As the general authority given by the act of ANNE carried with it the power to establish stands, so the general authority given by the act of 1813 carries with it the like power.

Again, hackney-coaches standing in the streets have existed so universally in England, and for so long a period (certainly since 1700, and perhaps further back), that the term hackney-coach conveys to the mind the idea of a coach standing in the street for hire. Thus, an eminent lexicographer (WEBSTER) defines a hackney-coach to be "a coach let for hire, commonly at stands in the streets." When, therefore, the legislature uses the term hackney-coach, it must be deemed to use it in such sense as to cover coaches for hire standing in the streets, as well as those kept in the stables for hire; and as the legislature did not see fit to legislate against the custom of coaches

standing in the street, but left their regulation to the common council, these passed to the common council, as an incident to such regulation, the power to prescribe places at which the coaches should stand.

I have, therefore, come to the conclusion that the common council has the power to establish hackney stands, either under the Montgomery Charter or the act of 1813..

There does not seem to be any inconsistency between the use of streets by the public for passage to and fro, and a designation of a certain space in them where that public may obtain the means for such passage in a more convenient, rapid and easy manner than by walking. The latter is an incident to the former. In all large cities of Europe such designation has been deemed a proper and legitimate use of the streets. Thus, in London, Liverpool, Dublin, Paris, Berlin, Vienna, and I am informed in all the large European cities, stands in the street for vehicles to be let for hire, are established. There is no reason why New York, the great commercial metropolis of the United States, should be without them. There can be no doubt that the Legislature could by express language authorize their establishment by the common council. The question in this case is, whether the common council has not the power without such express authorization; for the reasons above given I think they have. The common council, then, having the power to establish hackney-coach stands, and having established the *locus in quo* as one, and it not appearing that the defendants are misusing the right they have under the ordinance, an injunction cannot issue.

A few words as to the special damage, plaintiffs claim to have sustained. This, as I understand it, consists in the defendants soliciting and obtaining passengers, thus preventing plaintiffs from obtaining that custom they would otherwise have. In other words, they sustain damage from competition. It must be a strong and clear case of some violation of law or duty owed by the defendants to a plaintiff to induce a court of equity to restrain competition in trade. If in this case defendants leased a vacant lot alongside of plaintiffs, separated from the place where their carriages now stand only by the width of the sidewalk, and stood their carriages thereon, it

would not be pretended that the court would restrain their soliciting passengers; yet the injury to the plaintiffs would be the same as it is now. Plaintiffs may urge that defendants, by having their coaches open to view, ready harnessed in the street, have an advantage over them; but they are entitled to use the stand in the same way as defendants, and the affidavits show they do so use it. Again, plaintiffs say the "defendants, not being under so much expense as we are, inasmuch as they do not hire so large a stable, can afford to carry people at less rates than we can, and thus underbid us." But the rates at which people are to be carried are fixed. Neither plaintiffs nor defendants can exceed them. It is not alleged that defendants charge less than the legal rates. Indeed, such an occurrance would be an anomaly. It is by no means certain but that the expense of each one of the defendants bears the same proportion to the number of carriages used by them, as the expense of plaintiffs does to the number used by them.

It seems, therefore, to be reduced to this: that plaintiffs' injury consists either in their being unable to get more than the legal fare, by reason of the competition of defendants, or that by reason of defendants' carriages being there, the supply is so much greater than the demand that plaintiffs carriages do not get the amount of employment they otherwise would. The first ground of injury is one which the courts cannot recognize. The second is one which, if it was clearly shown to exist, would be sufficient to entitle the plaintiffs to the remedy they seek, provided the act complained of was unlawful. The papers do not clearly show such cause of injury to exist. If, however, it does exist, still the defendants' act being lawful, the only remedy of plaintiffs is by application to the common council. That body, upon considering the plaintiffs' cause of complaint and the public interests, can apply a remedy either by discontinuing the stand or limiting the number of coaches authorized to stand there.

It may be suggested that there is at present no ordinance regulating the rates of fare, and, therefore, were it not for defendants' competition, a much higher rate than usual could be charged by plaintiffs. The suggestion is one which is more likely to operate toward the withholding than the granting of

the discretionary writ of injunction. If the check of extravagant demands, formerly existing in the shape of ordinances, has been removed by the repeal of those ordinances, the greater reason why the check, by way of competition, should not be disturbed.

Plaintiffs' counsel contends that there is no longer in existance any ordinance establishing stands. He claims this on the ground that, on the 24th of April, 1867, the common council adopted a resolution repealing all ordinances theretofore adopted by the common council relating to hackney-coaches and carriages, and their owners and drivers. But it so happens that on the 1st of May, 1867, the common council adopted a resolution establishing the stand in question, with others. It is true this resolution was passed by the Boards of Aldermen and Councilmen prior to the adoption of the resolution of the 24th of April, 1867, but it was not approved by the Mayor until May 1, 1867. It, therefore, did not become a resolution or ordinance adopted by the common council until May 1, 1867, since an essential element to such adoption is the approval of the Mayor, or a passage over his veto, or his retention of the resolution for a certain period of time without approval or veto. (*Charter of* 1857, *Laws of* 1857, vol. 1, 876, §§ 11, 12, 13.) Consequently, on the 24th of April, it was not an ordinance theretofore adopted by the Common Council, and did not fall within the repealing resolution of April 24, 1867. It is also true that the resolution of May 1, 1867, purports to be an amendment of a resolution of 1866, which latter resolution falls within the terms of the repealing resolution of April 24, 1867. I am inclined to think that under the circumstances the resolution of May 1, 1867, must be regarded as re-enacting the resolution of 1866; but whether it does or not, the establishment of the stand in question is an entirely new provision, and is to be regarded as enacted at the time the amended resolution took effect. (Ely *v.* Holton, 16 *N. Y, Rep.*, 595, cited from 599.)

I may notice an objection raised by defendants. It is that the defendants are improperly joined as parties, because the acts of each one are wholly distinct from and independent of the acts of the other, and the complaint contains no charge of

combination. It is not necessary on this motion to determine the point, but it would seem not to be well taken. (*Daniel's Ch. Prac.*, vol. 1, p. 306.)

The motion for an injunction is denied with $10 costs.

WATERBURY *against* THE MERCHANTS' UNION EXPRESS COMPANY.

Supreme Court, First District; Special Term, September, 1867.

CORPORATIONS.—APPOINTMENT OF RECEIVER.

The effect of the statutes of the State of New York relative to joint stock associations, when read together, is, to give such associations all the qualities or attributes of corporations, except the right to have and use a common seal.

Proceedings for the dissolution of joint stock associations, in cases of insolvency, are to be conducted mainly according to the methods employed in the case of insolvent corporations, and not according to those derived from the law of simple partnership.

What facts will constitute a case of insolvency, such as will warrant the court, on the application of a stockholder in a joint stock association, in appointing a receiver and decreeing a winding up of the association.

Where the answer in an action brought against the Merchants' Union Express Co. to enforce a dissolution, alleged that the nominal plaintiff was not the real party in the suit, but that the suit was prosecuted wholly at the instigation and in the interest of rival companies, and this allegation was not denied in the affidavit read by the plaintiff on a motion for the appointment of a receiver—*Held*, that the allegation must be taken as true for the purposes of the motion, and that, taking it to be true, it was fatal to the suit. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose of dissolving or restraining an association or company of which the nominal plaintiff may be a member.

The general rules which govern the action of courts of justice in decreeing dissolutions of copartnership, stated.

Motion for the appointment of a receiver.

Waterbury *v.* The Merchants' Union Express Company.

This action was brought by Stephen P. Waterbury against the Merchants' Union Express Co., and Elmore P. Ross, and others, constituting the executive or managing committee of the affairs of that company. The facts involved in the present motion are sufficiently stated in the opinion.

BARNARD, J.—The object of this suit is to obtain a judgment or decree of this court dissolving the company, and for the appointment of a receiver to wind up its affairs. The company was organized in the year 1866 as a joint stock association, according to the laws of this State, with a capital of $15,000,000, divided into shares of $100 each. The stock was all subscribed for. By its articles of association the duration of the company was to be fifty years, and the individual defendants, Ross and seven other persons, were named in the same articles as the executive committee for the first year. The same individuals and a number of other persons were constituted the first board of trustees. Having completed its equipment, the company commenced business in October last, and it is now in vigorous operation on about 15,000 miles of railroad, including all the main lines of transit from the seaboard to and beyond the Mississippi river. Its principal competitors are the American and the United States Express Companies, and the evidence before me tends strongly to show that the volume of its business is equal to that of both those companies combined. The two other express companies here named are institutions of an older date, and they, together with the Adams Express Company, whose operations are confined mainly to the seaboard, had monopolized the express business of the country for many years prior to the organization of the Merchants' Union. It appears that they had divided territory and railroad lines so that the rates and charges of any one of them might not compete with either of the others.

Waterbury claims to have been an original subscriber for fifty shares of stock in the Merchants' Union Company, and subsequently to have purchased 100 shares, and, as a shareholder or partner in the enterprise, he asks in his complaint for a dissolution and a receivership, upon the grounds which I shall hereafter notice.

The defendants answered the complaint in June last, denying and refuting, upon the oaths of officers and executive committee, all the allegations upon which the right to the relief demanded is based. Issue was thus joined; but there was no trial or hearing of that issue.

The particular proceeding now before me is an interlocutory motion on *ex parte* affidavits for a receiver to take charge of the business and affairs of the company for the time being, and to have its condition examined by an account to be taken under the direction of the court, with a view to an ultimate determination of the question whether it shall be allowed to go on, or must be arrested in the first year of its operations. It is quite too plain to require serious argument, that such a motion cannot be granted with the issue yet untried and undetermined, unless on the affidavits now before me it appears beyond the possibility of doubt that in the final decision of the cause the relief prayed for in the complaint must be granted. Unless that appears from facts and evidence entirely unanswerable, it would be a judicial interference of the most unwarrantable kind now to take from a company of such vast and varied concerns the conduct and management of its own affairs.

Before proceeding to more particular questions it will be useful to consider briefly the nature and legal character of these joint stock associations. They are organized, not as simple partnerships, but with written articles of association framed under and with reference to the statute laws on the subject. The first act was passed in the year 1849. It was amended in the year 1851, and again in 1854. A further act, passed at the session of 1867, authorized these companies to hold real estate in perpetual succession. By an examination of all these statutes it will be found, that joint stock companies possess the following qualities or attributes of corporations: 1. They can, like corporations, sue and be sued in a single or collective name, to wit: the name of their president or treasurer. 2. Their property or capital is represented in shares and certificates of stock differing in no respect from shares and stock certificates in corporations. 3. The death of a member, his insolvency, or the sale or transfer of his interest, is not a

dissolution of the company. 4. They have perpetual succession, or what is sometimes called the immortality of corporations. 5. They can take and hold real and personal estate in a collective capacity and in perpetual succession. These are all attributes of a corporation, and if we look into the books for elementary definitions we shall find that corporations have no other attributes except the technical one of a common seal to distinguish them from common-law partnership. On the other hand simple partnerships have none of the attributes or qualities here mentioned. Mere names are of but little importance. Looking at the substance and nature of things, it is plain that in respect to the absence of a common seal merely, these joint stock associations are like partnerships. In the other and vastly more material respects mentioned, they are like corporations, although they are not declared to be such by the legislative acts referred to. And so it was in the case of the general banking act of 1838. The word corporation is not used in that act, yet the institutions or associations organized under it have been uniformly held to be corporations in the fullest and most exact sense. As to personal and individual liability, I may add, that this is an incident both of partnerships and corporations, uniform and invariable in the one case, subject entirely to the legislative will in the other.

What, then, are the true relations of a shareholder in one of these associations, and by what rules and analogies are his rights to be determined where he seeks a controversy with the body to which he belongs. These institutions are of such recent origin among us, and have arisen under laws of such recent enactment, that we are without judicial precedents in this country. It seems to me, however, plain that in controversies like the present one, we must follow mainly the analogies afforded by laws and jurisprudence in the case of corporations, instead of those derived from the law of simple partnership. I say mainly, because it may not be proper to push the principle to its extremest consequences. It may very well be that in a case of actual insolvency, the shareholder, in view of his contingent liability, should have a quicker remedy to wind up and close the concern, than the statute laws of this State allow in the case of corporations other than those organ-

ized for banking purposes. (See 2 *Edmond's Stat.*, 484.) Be this as it may, it is nevertheless true, that the situation and relations of a shareholder in one of these associations, are in other respects like, and very exactly like, those of a stockholder in a corporation. His interest is represented by a certificate of stock, which he can sell and transfer by a single indorsement. He has confided the management to a board of trustees, or some other authority named in the articles signed by himself, and the same articles prescribe the duration of the company. He has no right of management or control, except that which he exercises originally or periodically in the choice of the managers, and even then his right is not, as in the case of partnership, equal to that of every other partner, but is equal only to the amount of stock which he owns. He is bound by the compact which holds the association together and is the law of its existence, as the charter is the law of a corporation.

Guided by these relations, and by the nature of these companies, which have the express sanction of our laws, I am of opinion that the rules which govern simple common-law partnerships afford but a feeble analogy, if any at all, to govern us in the controversy which the plaintiff has instituted with the association to which he belongs, and in which he holds less than one-thousandth part of the stock. I have said that precedents have not yet arisen in this country. These companies have, however, existed for some time in England, and my conclusion seems to be fortified by authority in that country. Says Mr. Lindsay, in his *Treatise on Partnership*, "Nor is there any authority to the effect that companies with *transferable shares* are or can be dissolved by or on the happening of those events which are sufficient to dissolve, or induce a court of equity to dissolve, an ordinary partnership;" and again he says: "But notwithstanding the often repeated assertion that, at common law, unincorporated companies with transferable shares are mere partnerships, it ought not to be inferred that what is sufficient to dissolve the latter is sufficient to dissolve the former. There is a great, and with respect to the present question, a very material difference between the contract entered into between the members of an ordinary partnership,

and the contract entered into between the shareholders of an unincorporated company with transferable shares." I fully concur in these views, and they are decisive against the plaintiff in the present controversy, not only now, but apparently in all its stages, unless indeed he can claim the relief he asks for, on the very simple and intelligible ground of the insolvency of the company. And here it will be proper to dispose of that point in the case, if indeed it be said to be involved in the case at all.

The insolvency of the company is somewhat darkly and indistinctly suggested in the complaint, but I do not find any distinct averment of the fact. Whatever is averred on that subject is very distinctly denied in the answer, and the affirmative of the question must be maintained and proved by the plaintiff. Any suggestion or statement of this kind ought not to have been made in the absence of all facts to uphold it. On looking on all the affidavits before me on this motion, I find a very satisfactory vindication of the financial situation of the company. The subscribed capital of the company was originally $15,000,000. From $3,000,000 to $4,000,000 have been called and paid in, and for this the company is able to show a very large real and personal estate, and equipment, for the transaction of its immense business, together with the good will which it has acquired. The company has a cash surplus of several hundred thousand dollars, and it owes no debts. The officers and executive committee state, under oath, and apparently upon reasonable grounds, that the value of the property and equipment of the company, with that of the good will which it enjoys, very much exceeds the entire sum paid in by the stockholders. To these resources must be added the immense sum yet uncalled for and unpaid upon the subscription to the stock. This alone must amount to $10,000,000 or $12,000,000. There is no evidence before me, and I have no right to assume that, except Mr. Waterbury, all the subscribers to the stock are not able and willing to pay the sums they have agreed to pay. Now this vast amount of capital in reserve, is as much a part of its resources as the cash or property in actual possession. With an estate, therefore, in hand, worth some millions of dollars, owing no debts, and holding valid obligations or

subscriptions for the payment of at least $10,000,000 more, what further need be, or indeed can be said in regard to the solvency of this company?

Proceeding to other grounds, stated or suggested in the motion papers, it is no cause for this suit, or for the proceeding now before me, that the Merchants' Union Express Company has not thus far conducted its business with actual profit to its stockholders, nor can the suit be maintained on the ground that thus far losses, whether small, or even considerable, have occurred. What all the members of this company agreed to, is, that the enterprise should be carried on for fifty years, and that $15,000,000 of capital should be embarked in it, if necessary; of which each member should pay the amount subscribed by him. There is no pretense or suggestion that this compact was entered into by means of any fraud practiced on the plaintiff, or any one else. It is, therefore, a binding compact, which the courts have no right to dissolve, while the company is solvent, or at least, until we are able judicially to determine that the enterprise is wholly impracticable, and the attainment of its object morally impossible. A fraud practiced upon the plaintiff might release him from his obligations, and justify the cancellation of his subscription, but it would be of no effect whatever on the question of dissolution and receivership. But fraud is not the theory of his case. He does not wish to be separated from his associates, or from the enterprise. His avowed object is to wind up and close the concern, and to share in the distribution of all the assets as one of the associates or partners. This, he cannot do in violation of his agreement, and in opposition, so far as I know, to the wishes of his associates, who, as the evidence in the case shows, are some ten thousand in number.

I repeat, the fact that some losses have occurred, affords no justification for this suit, or for this proceeding. No doubt, profit to the shareholders is the primary motive which prompts the formation of such associations. But people embark in such enterprises in full view of all the hazards and vicissitudes of business—in full view, not only of present and immediate chances of gain or loss, but also of the failure and remote possibilities and capacities of the business to be undertaken.

This must have been eminently true at the organization of the Merchants' Union Express Company. In its very nature, the business in contemplation was one to grow and increase with the increasing population and the expanding wealth and commerce of this country. The plaintiff's disappointment in not receiving a dividend, or even the admission of an aggregate loss thus far by the company, is no reason for closing and winding it up, in the first and experimental year of its existence. On this subject it is only just, although not very material, to observe that whatever losses have been thus far experienced, they are wholly due to the combined opposition of the rival companies which have been mentioned, and which, by reducing their own rates far below a paying standard, rendered a reduction by this company necessary. That reduction was made and has been maintained, but never down to the rates of the competing companies. It is just and proper further to observe, that the increased volume of the business of defendant's company, is now not merely compensatory, but more or less profitable. On this point the affidavits before me are quite explicit.

Passing to another view, as I have already said, the grounds of relief set forth in the plaintiff's complaint are fully met and controverted by the answer. This motion is made on affidavits or *ex parte* depositions of the plaintiff, and of certain persons who are officers and managers of the three old express companies. The plaintiff, in his own affidavit, says nothing to reinforce his complaint. The other persons referred to, develop a theory of the situation which may deserve a brief attention. It is their opinion, founded, as they say, on a long experience and careful observation of the express business in this country, that two competing companies cannot prosecute their business on the same lines without aggregate loss, and, consequently, that one or the other must ultimately fail. The conclusion they draw from these premises seems to be, that, as they are first in possession, have the greatest experience, and are, as they think, the strongest, their more youthful rival should retire, or be dissolved and wound up by a judicial sentence. This conclusion is suggested in no very indistinct manner. On the

other hand, the fact so assumed, that competition in the business cannot live, and live profitably, is controverted, and, I am satisfied, entirely refuted by the opposing affidavits.

It is, however, upon the doctrinal conclusion, derived apparently from these carefully prepared statements and opinions of the persons referred to, that I propose to make one or two observations. In business and commercial rivalries it is perfectly lawful for each competitor to overcome and distance his rival, if he can. There is no divine right to a monopoly. It was never before suggested that a great enterprise must be closed on such a ground, because one or even many of those engaged in it, less than a majority of the whole, can be induced so to declare their wishes. If this doctrine can be maintained, then an express monopoly, having got possession of all the rail lines of the United States, is entitled by law to hold them forever against all competition. I say entitled by law, because it will never be difficult to find and purchase a stockholder in the rival company who will raise the question in the courts; and the principle will not stop here; it must apply to all enterprises requiring the association of capital, and it must henceforth become a regular function of the courts to inquire whether rival or competing enterprises can succeed, and if not, then to determine which of them must be closed by judicial decree. Such a proposition, if sanctioned for a moment, would be received with great dismay by the people of this country. It rises to a height of extraordinary absurdity when it is claimed, as in this case, that the existence of a powerful rival can be terminated on the *ex parte* opinion and oath of his competitor in a legitimate branch of business.

The remaining grounds for the relief which plaintiff demands, resolve themselves into the alleged personal misconduct of the members of the executive or managing committee. This has, I think, nothing to do with the present motion for a receiver. The infidelity or misconduct of some, or even of all trustees or managers of such an association, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management, and placing it in the hands of an officer of the court. In such

a case, the principles of remedial or preventive justice go no further than to enjoin or forbid the misconduct, or remove the unfaithful officer. I am not aware of any authority for dissolving a corporation or an unincorporated stock association, or for taking its management from its proprietors or shareholders, on the mere ground that one, or even all of its trustees are unfaithful. The court may enjoin the trustee, or suspend or remove him, and, if necessary, may order a new election, but cannot substitute its own officer. In the case of the Merchants' Union Express Company, both by statute law and its articles of association, three of its managers are sufficient to carry on its business. There are more than that number upon whom no imputations are cast by the plaintiff, or by the persons from the rival companies who have given their depositions for this motion. It seems proper, however, to observe, that all the accusations and charges of misconduct and unfaithfulness are fully answered by the oaths of every member of the executive committee, and by the corroborating depositions which have been made in opposition to this motion. I confess, the impression on my mind is very strong that these gentlemen have done nothing to forfeit the confidence of the stockholders, or which would warrant the court, even at the final hearing of the cause, to interfere with their existing relations of the company. That nothing of the sort can be done on this motion is quite too plain for further discussion.

In speaking of the peculiar part taken in this controversy by the officers and managers of the old and now rival express companies, whose deposition are alone brought forward to sustain the plaintiff's motion, I am brought to another view, which as the case now appears, seems to me entirely decisive. The answer of the defendants was served on the plaintiffs more than two months ago. In that answer it is alleged with great distinctness, on the information and belief of the defendants, that Waterbury, the plaintiff, is not the real party in suit, but that the suit is prosecuted wholly at the instigation, and in the interest of the rival express companies which are the real and actual plaintiffs in the controversy. This grave and serious allegation called for a denial on the part of the plaintiff in preparing his own affidavit for this motion, and not less for

a denial by the other persons referred to, whose *ex parte* depositions have been read. There is no such denial. I have not the slightest reason to suppose that this omission is unintentioned or inadvertant, and, coupling it with many other circumstances which need not be particularly noticed, I am compelled to take the fact, as alleged by the defendants, to be true for all the purposes of this motion; and, taking it to be true, it is fatal to the suit. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose of dissolving or restraining another association or company, of which the nominal plaintiff may be a member. This has been repeatedly adjudged in the English Chancery Courts, and the principle is so plain as not to need further illustration. (See Forrest *v.* Manchester & Co., 7 *Jurist*, new series; Burt *v.* British National, &c., Insurance Co., 5 *Id.*, 612.) In all that I have said so far, no reference has been had to the rules which govern in mere common-law partnerships, because the defendants are not, in my judgment, an association of that kind. If this were otherwise—if the defendants were a mere partnership, with none of the corporate attributes conferred on them by the statute of this State, I should still feel the same difficulty in finding any principle or authority to sustain the action on this proceeding. In partnerships which have no statute or corporate qualities, we shall find the following rules well settled: 1. The majority of members govern, notwithstanding the dissent of the minority, where there is no fraud or unfair dealing. In this case the plaintiff is one of many thousands, none of whom, so far as appears, concur with him. 2. When partners are numerous and the duration and arrangement of a concern are provided for by articles, those govern the rights and relations of each partner. (*Story on Part.*, §§ 123, 204, 213.) 3. A receiver will be appointed only with a view to a dissolution and winding up. Receivers are not appointed to carry on and manage the business of a partnership. (*Story on Part.*, 664, 665; 2 *Paige*, 310.) 4. A dissolution will not be decreed except in cases of insolvency, or where the entire capital is spent and some of the parties are unwilling to go further, or where the undertaking in its nature

and essence presents some insurmountable difficulty, or where one partner is guilty of such grossly improper or fraudulent conduct as amounts to an exclusion of his copartner from the concern. In these, and possibly some other extreme cases, a court of equity may decree a dissolution and receivership. But I find nothing to justify judicial intervention in a case like the present.

In closing, I deem it proper to say, what the evidence before me fully demonstrates, that the Merchants' Union Express Company is an institution having vast, varied and useful relations with the public. It is now in active and successful operation over the most populous and commercial regions of the United States. If the suppression of the company could be brought within the powers and duties of this court no public good, but great public inconvenience and loss, would be the result. The necessary effect of such decision would be to restore permanently a monopoly in a branch of business of great and increasing importance in this country to merchants and many other classes of people. I do not see the slightest pretext for such an interference with a legitimate and honorable enterprise, and certainly feel no regret that the facts and principles which the case involves have brought me to this conclusion.

The motion for a receiver, &c., must be denied.

KING *against* PLATT.

Court of Appeals; March, 1867.

APPEALABLE ORDERS.—ORDER TO SET ASIDE A JUDICIAL SALE.

An appeal may be taken to the Court of Appeals from an order of the General Term affirming an order of the Special Term denying a motion to set aside a judicial sale made under a judgment.

Such an order is final; it affects a substantial right; and it is an order made upon a summary application in an action after judgment.

Such an order is not purely discretionary with the court below, in such a sense as to prevent it from being reviewed.

An appeal in such a case is in time if taken within two years from the entry of the order. The order is in the nature of a judgment, within the meaning of the Code of Procedure.

Motion to dismiss an appeal.

The appeal was taken by the defendants from an order of the Supreme Court, made at a general term in the city of New York, on December 31st, 1864, affirming an order of the special term, made December 18th, 1863, denying a motion of the defendant to set aside a sale of certain real estate in the city of New York, and that a re-sale should be had under a judgment of the court previously rendered.

The facts of the case are as follows: The action was brought by Charles King, Edward J. King and Sylvester Brush, against Nathan C. Platt, to compel the specific performance by the defendant of an agreement to purchase real estate in New York. The purchase price was $75,000, and the time fixed for the performance was October 6th, 1860. It resulted in a judgment in favor of the plaintiffs, which was entered on the 15th of March, 1862.

This judgment adjudged the balance of the purchase money unpaid, with interest, to be $78,412 60, and directed the defendant to complete his purchase within ten days, by paying the costs, &c., and $22,162 60 of the purchase money due, and execute and deliver his bond and mortgage on the premises to secure the balance ($56,250).

It was further adjudged, that if the defendant failed to comply with the judgment within the ten days, then that the premises be sold at auction under the direction of a referee; and that out of the proceeds of the sale the referee pay costs, &c., and the amount due the plaintiffs, and deposit any surplus to abide the order of the court; and if there should be a deficiency, that the defendant pay the same, &c.

No appeal was taken from this judgment. When the sale took place, the whole property brought $75,950, and was

purchased by or in behalf of the plaintiffs, leaving a deficiency of about $10,000.

The premises were conveyed to the plaintiffs by the referee, and he made and filed his report.

On February 12th, 1863, the defendant procured an order requiring the plaintiffs to show cause why the sale made should not be vacated and set aside, and a re-sale ordered.

This order was obtained upon affidavits suggesting the following as grounds upon which a re-sale was moved for:

1. That the sale was made on the day of a *charter* election.

2. That the auctioneer, named in the notice, did not personally officiate at the commencement of the sale.

3. That the price bid was inadequate.

4. That the plaintiffs approached bidders at the sale, and deterred them from bidding, and prevented competition, &c.

These allegations were met and substantially denied by affidavits on the part of the plaintiffs; and when the motion came on to be heard at special term, an order was first made referring it to a referee, "to take proof whether any, and if so, what inducements, communications or representations were made or held out by the plaintiffs or their agents, or in their behalf, or by the referee, to deter or prevent bidders at the sale had under the judgment in this action;" and he was directed to report proof to the court. On the coming in of the report, counsel were again heard upon the report of the referee and the original papers, and on December 18th, 1863, the motion was denied, with costs. This order was affirmed at the general term, and from the order of affirmance the appeal of the plaintiff was taken to this court December 29, 1866.

John H. Reynolds for the motion. I. The question involved in the application to the supreme court resulting in the order appealed from, required the exercise of mere discretion, and the decision of the supreme court is final, and the order not appealable to this court. This has been several times so adjudged by this court. (Dow *v.* Conden, 28 *N. Y.*, 122; Buffalo Savings Bank *v.* Newton, 23 *N. Y.*, 160; Wakerman *v.* Price, 3 *Comst.*, 334; Hazleton *v.* Wakeman, 3 *How. Pr.*, 357.) 1. In

the cases cited the order of the court below directed a re-sale, but in this case the re-sale was refused. Whether the decision be one way or the other can make no difference, as the right of appeal depends upon the character of the questions involved in the order appealed from, and not upon how they were decided. If resting in discretion, a decision either way is final. 2. In fact, it is very easy to see that there is no fixed legal right involved in the present question. It is, simply, whether an officer of the supreme court has duly executed its process, or has abused it; and that question belongs to the court whose judgment or process is claimed to have been abused. 3. A matter resting in the discretion of a court or judge, is not such a right as can be made the subject of an appeal to this court. 4. It may be conceded that the general term could hear an appeal from an order of the special term in a case like the present, but that does not prove that an appeal lies to this court. (People *v.* New York Central R. R. Co., 29 *N. Y.*, 418.)

II. The appeal was too late, and for that reason should be dismissed. 1. The statute requires that an appeal under the subdivision 3 of section 11 of the Code must be taken within two years after "the *judgment shall have been perfected by filing the judgment roll.*" (*Code*, §§ 11, 331.) 2. The judgment roll in the present case was filed March 15, 1862, and the appeal taken on December 29, 1866. 3. The statute seems to be plain that the appeal from an order under subdivision 3 of section 11, *must* be taken within two years after the judgment in the action is perfected, and however unwise this provision may be the court must give it effect.

James Emott, opposed. I. The appeal in this cause was taken in time. 1. The word "judgment" in section 331 of the Code signifies the "actual determination" made at general term; in this case, the order appealed from, which is "a final order in the nature of a judgment." (Bank of Genesee *v.* Spencer, 18 *N. Y.*, 152.) It cannot signify the special term judgment in this action; because the time to appeal can be limited only upon something from which an appeal can be taken. By the Code, it is uniformly limited upon the thing, or notice of it, ap-

pealed from. The special term judgment had been perfected more than two years when the general term order was made. Thus, an appealable order might be made at a day when the time to appeal from it had expired. An absolute legal right would begin to exist when its day had passed. 2. This appeal was taken within two years after the general term order, and is in time. That such appeals have been entertained, see Wolcott *v.* Holcombe, 31 *N. Y.*, 125.

II. The order is appealable within subdivision 3 of section 11 of the Code. It is a final order, affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment. 1. The order is *final.* While it remains, there is no other proceeding in the action possible. Except for this appeal, the litigation is ended; nor is there left to the appellants any remedy. 2. It affects a substantial right. The equity of redemption in valuable real estate is gone beyond recovery. A judgment for $10,269 67 deficiency has passed against appellants. An order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights, not in a matter of form, but in substance. (People *v.* Central R. R., 29 *N. Y.*, 422.) 3. It was made on a summary application for a resale after judgment, and assumes the validity of the judgment. It is settled in this court, that the order referred to in subdivision 3, is one founded upon the judgment and recognizing its validity. (McGregor *v.* Comstock, 19 *N. Y.*, 583; Selden *v.* D. and H. Canal Co., 29 *N. Y.*. 637.) 4. Under circumstances clearly distinct from this case, orders in cases of judicial sales, have been held not to be appealable. (Dows *v.* Congdon, 28 *N. Y.*, 122; Buffalo S. Bank *v.* Newton, 23 *N. Y.*, 160; Wakeman *v.* Price, 3 *Comst.*, 334; Hazleton *v.* Wakeman, 3 *How. Pr.*, 457.) In all these cases, the motion for re-sale was *granted.* There were further legal proceedings to be taken; a re-sale, a report, and the proceedings thereon; the order was not final. The respondent's substantial right, viz.: to collect the principal and interest of his claim, was not affected. (Collier *v* Whipple, 13 *Wend.*, 228.) 5. In the last reported case in the court of errors, an appeal was entertained from an order

of the Chancellor *refusing* to grant a resale. (Tripp *v.* Cook, 26 *Wend.*, 143.)

III. The grounds upon which this case was presented to, and decided in the Supreme Court were not addressed to its discretion. The relief was claimed as a right, a legal remedy from the fraud of respondents. It is when the order involves no question of strict legal right, that it is deemed within the discretionary powers of the court below, and not appealable. Dows *v.* Congdon, 28 *N. Y.*, 124.) In this case this question of strict legal right is involved: Whether the respondent's misconduct and interference with bidders at the sale, resulting in their purchase of the property and a judgment for deficiency, was not unconscientious and oppressive, and a violation of fixed principles of equity?

IV. The respondents' interference with free bidding was a constructive fraud, and a violation of the settled equitable principles by which judicial sales are controlled. (See Thompson *v.* Davis, 13 *Johns.*, 115; Twining *v.* Morrice, 2 *Brown's Ch.*, 331; Jackson *v.* Crofts, 18 *Johns.*, 110; Collier *v.* Whipple, 13 *Wend.*, 226; Brown *v.* Frost, 10 *Paige*, 246; American Ins. Co. *v.* Oakley, 9 *Paige*, 259; Gould *v.* Libby, 24 *How.*, 440; *Story Eq. Jurisp.*, 293; 1 *Sugden V. & P.*, 96, § 12; Brisbane *v.* Adams, 3 *Comst.*, 129.)

By the Court.—BOCKES, J.—The motion at special term was to set aside a judicial sale, made under a judgment of foreclosure.

The motion was denied. On appeal to the general term, the order was affirmed. An appeal was then taken to this court from the order of affirmance.

The motion now is to dismiss the appeal, as I understand it, on two grounds: 1. That the order is not appealable, because not falling under any of the subdivisions of section 11; and 2. Because the granting or refusing of the order was in the discretion of the court below.

I think the order comes within the purview of subdivision 3 of section 11.

The appeal is from an actual determination of the general

term, and is a final order affecting a substantial right, made upon a summary application, in an action after judgment. It plainly answers each of these requirements.

But it is insisted that it is not a final order.

It denied the motion, and ended the proceeding. Nothing further could be done in the proceeding. It closed finally the summary application, and consequently was a final order, and no right remained to the party except to appeal. So, I think the order would have been equally final, had the motion been granted instead of refused. It would, in that event, be complete and final as to the application: the judgment of the court on the merits of the application.

Whichever way decided, it was final in the sense of a final adjudication. A *final* judgment means a judgment which concludes the parties, as regards the subject-matter in controversy in the tribunal pronouncing it, whichever way the decision may be given. It is called final in contra distinction from interlocutory. This is the view taken by this court in Buffalo Savings' Bank *v.* Newton (23 *N. Y.*, 160). In that case the sale was set aside, and Denio, J., says: "The order was final within the meaning of section 11 of the Code." All the judges concurred.

But notwithstanding all this, if the order rests purely in the discretion of the court, the appeal will for that reason be dismissed. And this brings us to examine the cases cited by the respondents' counsel on this motion.

In the last case cited (Buffalo Savings' Bank *v.* Newton, 23 *N. Y.*, 160), the appeal was dismissed. Judge Denio says, notwithstanding the order fell directly within the provision of subdivision 3 of section 11, still "it rested purely in the discretion of the court to grant or refuse."

On looking into that case it will be seen that the motion was addressed to the favor of the court, and was not urged as a matter of legal right. No irregularity even was suggested, but the party asked a favor, and hence the granting or refusing it was purely discretionary.

In Dows *v.* Congdon (28 *N. Y.*), a re-sale was ordered, and also a reference was directed to ascertain the value of the land without improvements, with a view to further action

in the case. The appeal to this court was dismissed on the ground that it was not final; all the judges concurring.

Even Judge Emott, who dissented on other grounds, concurred in this. In this case Judge Wright well remarks and notes the true distinction now before us, that the granting of such an order (an order setting aside a judicial sale), when it involves no question of strict legal right, is within the discretionary power of the court below, and not appealable; clearly and, as I think, very justly implying, that if the motion rested on facts giving a strict legal right to demand it, the order would be appealable.

In Wakeman *v.* Price (3 *N. Y.*, 334), the sale was set aside. It was decided that an appeal would not lie, because the sale was in all respects regular and fair, and the motion was, as the case states, addressed to the favor of the court; hence, purely discretionary. The case of Hazleton *v.* Wakeman (3 *How.*, 457), was similar to Wakeman *v.* Price in all respects.

So it seems that the four cases on which the motion before us is based, fail to give it support, unless this case, like those cited, was before the Supreme Court as a matter of pure discretion, not involving a question of strict legal right.

This is the rule laid down by Judge Wright in Dows *v.* Congdon, and is unquestionably sound.

So in Tripp *v.* Cook (26 *Wend.*, 143), the same distinction was marked, and it was then said, in substance, that an order which gave effect merely to the will of the judge was one resting in pure discretion. Not so, however, when a case was made for the application of legal rules and principles of equity.

It now remains to be seen whether the case before us does involve a strict legal right. If it does, the appeal is properly taken.

The party claimed that he had been defrauded at the sale; that it was unfairly and unjustly conducted to his injury; and he alleged that the plaintiff and purchaser approached bidders and dissuaded them from bidding; that they need not bid, for the plaintiff would outbid them, and intended to

bid it in; and that such persons as wanted to purchase, could buy on more advantageous terms of the plaintiff; and thus discouraged and prevented bidding. The motion was, therefore, grounded on fraud, and thus became a strict legal right.

If the charge of fraud should be sustained, the party was entitled to have the sale vacated—not as a matter of favor, but as a matter of right; and he could have maintained a direct action in equity to set aside the sale, instead of proceeding by motion.

The case of Tiernan *v.* Wilson (6 *Johns. Ch.*, 411), and of Clowes *v.* Dickenson (5 *Johns. Ch.*, 235), afterwards in the Court of Appeals (9 *Cow.*, 403), are full on this point. See, also, Cantine *v.* Clarke (41 *Barb.*, 629). So, it seems that fraud in conducting a judicial sale gives a party a right of action, which may be enforced in a suit instituted for that purpose. This proves it to be a strict legal right, and it follows that a motion to set aside a sale for fraud involves such right, and it is not therefore discretionary.

This appeal should not, therefore, be dismissed on the ground that the motion was addressed to the favor of the supreme court.

This view is in strict conformity with the rule stated by Judge Wright that the granting of such an order, when it involves no question of strict legal right, is within the discretionary power of the court below, and not appealable.

It is next urged, that the appeal in the case under subdivision 3 of section 11 is controlled by section 331, which requires the appeal to be taken "within two years after the judgment shall be perfected by filing the judgment roll."

The appeal in this case was not within the limitation above specified, unless we either regard the roll incomplete until the order granted on the motion, and also the order of affirmance at general term was attached and made part of it; or unless we regard the order appealed from as a final order in the nature of a judgment.

It was said in Bank of Genesee *v.* Spencer (18 *N. Y.*, 152), that this class of orders rested on the assumption that the

judgment was valid, and the proceeding in such case was based upon it; which proceeding itself might terminate in a final order in the nature of a judgment." This, it seems to me, is a sensible construction to put on this class of orders. The proceeding is a new and irregular one, and demands an adjudication of a new question on new facts occurring after the entry of judgment. As regards these facts, and the adjudication upon them, the final order (as Judge Pratt says) is in the nature of a judgment. In this view, the appeal is in time.

Nor can we now, on this motion, pass on the merits of the application. It is true the court, at special term, held that the party failed to make a case of fraud entitling him to the relief he sought, and the general term came to the same conclusion. But the appellant insists that the supreme court was in error in that determination, and demands that it be corrected by this court. This question will be determined when the appeal shall be heard on the merits. In that regard, it is enough that the party made a case requiring the application of legal or equitable principles to its determination.

The motion to dismiss the appeal is denied.

GRAY *against* HANNAH.

Supreme Court, Eighth District; General Term, March, 1867.

APPEAL FROM COUNTY COURT.—COSTS.

Upon an appeal from a judgment of a County Court, to the Supreme Court, the successful party is entitled to the full costs given by subdivision 5 of section 307 of the Code of Procedure.

The right to those costs being given by statute, any provision in the order of the Supreme Court determining the appeal, which purports to limit the costs to a less sum—*e. g.*, a provision awarding motion costs only—is a nullity.

Gray *v.* Hannah.

Entering an order containing such a provision is not a waiver of the statutory costs.

Appeal from an order of the special term denying a motion for re-taxation of costs.

This action was brought by David Gray against Alexander Hannah. It originated in a justice's court, where the plaintiff recoverd a judgment for eighty-six dollars damages, besides costs. The defendant appealed to the Monroe county court, where a new trial was had, and the plaintiff received a verdict for eighty dollars only; and as the recovery was less favorable for him than in the justice's court, the county court ordered that he pay costs to the defendant, and that they be set off against the plaintiff's recovery. On appeal to the general term of the supreme court, that order was reversed, with ten dollars costs. (See 1 *Abb. Pr., N.S.*, 48.) The plaintiff then docketed a judgment in the county court for the amount of his recovery, besides interest and $49 81 costs, and collected the same. The ten dollars costs allowed by the court on appeal were not included in the judgment, nor collected; and subsequently the plaintiff procured the clerk to tax the costs of such appeal at $61 48. The defendant then moved at special term for a re-adjustment of such costs, on the ground that the plaintiff was entitled to only the ten dollars costs allowed by the order; but the motion was denied, and the defendant appealed.

J. H. McDonald, for appellant

H. H. Woodward, for respondent.

*By the Court.**—James C. Smith, P. J.—The question is whether the plaintiff is entitled to the amount of costs on appeal given by the fifth subdivision of section 307 of the Code. A bare reference to the language of the section is sufficient to determine the question in the plaintiff's favor. The section provides that "when allowed, costs shall be as

* Present—J. C. Smith, P. J., and E. D. Smith and Johnson, J. J.

follows: * * 5. To either party on appeal except to the court of appeals, and except appeals in the cases mentioned in section 349, before argument, fifteen dollars; for argument, thirty dollars," &c. The only appeals authorized by section 349, are those taken from orders in actions in the supreme court (11 *How.*, 203; 20 *Id.*, 421). The appeal in this case not being one of that class, nor an appeal to the court of appeals, is not within either of the exceptions, and is therefore one of the cases in which costs are given by section 307. It is an appeal under section 344, as amended in 1860. That section is a part of chapter 3 of title 11, which is entitled "appeals to the supreme court from an inferior court," while section 349 is in chapter 4, which is entitled "appeals in the supreme court * * from a single judge to the general term." Prior to the amendment of section 344, it was held that there was no right of appeal to the supreme court from an interlocutory order made in the progress of a cause in a county court (Smith *v.* Hart, 11 *How.*, 203). The amendment seems to have been adopted to supply the want pointed out by that decision.

It is apparent that the above cited provisions of section 307 in respect to costs on appeal was intended to apply to appeals from orders as well as to those from judgments, since one class of appeals from orders, to wit, those authorized by section 349, are expressly excepted from its operation.

The only considerations suggested in opposition to the views above expressed, are that it is unreasonable to allow full costs in appeals from orders under section 344, while limiting them to mere motion costs in appeals under section 349, and that the legislature in adopting the amendment to section 344, may have overlooked the effect produced by it in connection with section 307 upon the costs of appeals to be brought under its provisions. These considerations would be entitled to much weight, if the legislature had employed words of doubtful meaning, but they have not done so. Their language is clear and unambiguous, and we cannot assume that they overlooked its obvious and necessary effect, or that they intended to express a different meaning. However unreason-

able or impolitic the provision may be, the courts have no power to amend it.

The plaintiff's right to full costs being given by statute, the court cannot take it away, and the provision in the order limiting his costs to ten dollars is a nullity. It being void, the entering of the order in that form, was not a waiver of the plaintiff's right to costs, and he was regular in afterwards procuring them to be adjusted.

The order should be affirmed, but without costs, as the question is novel, and one of practice merely.

All concurring, ordered accordingly.

HARPER *against* ALLYN.

Supreme Court, Seventh District; General Term, September, 1867.

PRACTICE ON APPEAL.—ENUMERATED MOTIONS.

An appeal from an order of the County Court, granting a new trial, on the judge's minutes, is an enumerated motion; and must be placed upon the calendar, and brought on upon printed papers.

An appeal from an order of the county court.

This action was brought by William Harper against Lewis Allyn. The question presented in the present proceeding, which was one of calendar practice only, appears from the opinion.

*By the Court.**—JAMES C. SMITH, J.—This is an appeal from an order of the Monroe county court, granting a new trial in that court, on the minutes of the county judge. It is moved by the appellant, for hearing, as a non-enumerated motion,

* Present—J. C. SMITH, P. J., and WELLES and E. DARWIN SMITH, J. J.

the papers not having been printed, and the cause not having been placed on the calendar. The respondent's counsel objects that it is an enumerated motion, and that it cannot regularly be brought on for hearing, except in the mode prescribed by rules 42 and 43 of this court.

We are of opinion the objection is well taken. The motion is of the class termed enumerated. The Code provides that the argument of an appeal of this description, must be had upon a case or exceptions (*Code*, § 264, *sub.* 4; § 366, *sub.* 6), and by the provisions of rule 40, motions on cases or exceptions are enumerated. Rule 42 applies expressly to enumerated motions, and requires a copy of the papers on which the motion is founded, to be furnished at least eight days before the term, and provides that if it is not done the opposite party may move to strike the cause from the calendar. Rule 43, which requires the papers to be printed, applies to appeals to the general term in cases embraced in chapter 3 of title, 11 of the Code, and the present appeal is given by § 344 which is a part of that chapter.

This view of the question is not affected by the provision of section 344, that the "appeal shall be heard on a copy of the papers on which the order appealed from was made." That provision is not inconsistent with the rules referred to, which prescribe and the mode in which the papers shall be prepared furnished.

Our attention has been called to the case of Willis *v* Trainner, (MS. case, heard in 1864), in which we overruled the objection now under consideration, and heard a similar appeal upon a manuscript case, as a non-enumerated motion. The objection appears to have been disposed of when it was raised without deliberate examination, and we are satisfied the decision should not be followed. But as the appellant's counsel evidently relied upon it, in his practice in the present case, we direct that the motion stand over till the next term, to give him an opportunity to bring on the case as an enumerated motion, and we do not give costs on this motion to either party.

SCHMITT *against* COSTA.

New York Common Pleas; General Term, June, 1867.

LIABILITIES OF MARRIED WOMEN.

An action is not maintainable, under the statutes of this State, against a married woman, to recover for articles sold to her, where she is not engaged in carrying on any trade or business, and has no separate estate.

Appeal from a judgment of a district court.

This action was brought in the district court of the city of New York for the sixth district, by Charles C. Schmitt against Charlotte Costa, for $56 claimed as balance due upon the sale of a sofa, by the plaintiff to the defendant. The defence was that defendant was a married woman; and that the statutes relative to married women did not authorize a personal action against her, inasmuch as she carried on no business, and owned no separate estate. Upon this ground the justice rendered judgment for defendant, from which the plaintiff now appealed.

Thomas Brennan, for the appellant.

Philip F. Smith, for the respondent.

By the Court.—CARDOZO, J.—The plaintiff seeks to make the defendant, who is a married woman, not carrying on any trade or business, and not having any separate estate of her own, liable for some household furniture which he sold and delivered to her. So far as this claim rests upon the statutes of this States respecting married women, I think it cannot be supported. It was not pretended on the argument but that down to the passage of the act of 1862 (*Session Laws*, 1862, 343), the authorities were against the defendant's liability. (Barton *v.* Beer, 21 *How. Pr.*, 309; Brown *v.* Herman, 14 *Abb. Pr.*, 394); But it was supposed that the word "purchase"

which was then for the first time introduced into the statute (§§ 7 and 3) effected a change.

I think that is not so. The property which is to be her separate estate, the transactions in which she may engage for her sole benefit, and the manner in and the circumstances under which she can acquire additional property, are regulated by other sections of the statutes which have not undergone any change since the decisions above referred to.

The 7th section confers no additional right either to contract or to acquire (except as the results of a suit) any property, but simply authorizes her to sue and be sued, and must be read in connection with the previous sections which regulate of what her estate shall consist and how she may acquire it, and under what circumstances she may contract respecting it.

This disposes of the only question in the case. The trial seems to have been conducted and decided below upon the theory that the liability of the defendant must depend entirely upon the statute. The proof, although I imagine from the evidence given, that the defects could have been supplied was not sufficient to fully present the point, and therefore it is unnecessary to decide whether a case might not have been made in which the defendant could have been held liable at common law. (See a review of many oft he authorities in Gregory *v.* Paul, 15 *Mass.*, 31.)

The judgment must be affirmed with costs.

HOE *against* SANBORN.

Court of Appeals; January, 1867.

APPEALABLE ORDERS.—DAMAGES ON BREACH OF WARRANTY.—EXPERTS.

An appeal does not lie to the Court of Appeals from an order of the General Term affirming an order of the Special Term denying a motion to re-tax the costs and correct the judgment roll in respect thereto.

But upon an appeal from the *judgment*, the propriety of the *order*, so far as the question of legal right to costs is involved, is reviewable. Any question of the propriety of making a formal correction in the order, is a question of practice for the court below, and cannot be raised in the Court of Appeals.

An order of the General Term, dismissing an appeal from an order of the Special Term described as "an order refusing a *mandamus*," but the papers connected with which were entitled in the action, and gave no indication of proceedings for a mandamus,—*Held* not appealable to the Court of Appeals.

An appeal does not lie to the Court of Appeals, from an order of the General Term dismissing an appeal from an order of the Special Term denying a motion to re-settle a case.

When the objection upon which an appeal from the Special to the General Term was taken, is clearly untenable, and the order appealed from was proper on the merits, the Court of Appeals will not review the order of the General Term upon the ground that the General Term should not have *dismissed* the appeal. As the effect of dismissing the appeal in such a case is the same with that of affirming the order, any error in the mode of arriving at the result would be immaterial.

When goods are sold with a general warranty of quality, and the buyer retains them notwithstanding they are not as warranted, he is liable in an action by the seller to recover the price, for the contract price, less his damages sustained by the breach of warranty. The breach of warranty is ground for recoupment of damages only. To bar the action for the price, the buyer must rescind the contract, and return the goods.

There is no distinction in this respect between cases where the article is wholly unfit for use, and those where it is only partially unfit; if the article has some intrinsic value.

A witness who stated that he had been in business for many years as a manufacturer of saws, and blacksmith, and that he was familiar with the material and quality of saws, *Held* presumptively competent to give an opinion of the weight of saws in question and the value of their material.

Motion to dismiss appeals.

This action was brought by Richard M. Hoe against Jesse Sanborn. The facts involved in the present hearing are sufficiently stated in the opinion.

PARKER, J.—The appellant in his notice of appeal states, that he appeals from the judgment in the action, and from three several orders of the Supreme Court, which he specifies. The respondent, at the last September term of the court, moved to dismiss the appeals from the orders; when the court directed the motion and the appeal to be heard together.

The orders thus appealed from are:

1. An order affirming an order of the special term, denying a motion for a re-taxation of costs, and to correct the judgment roll.

2. An order dismissing an appeal from an order of special term refusing a *mandamus*.

3. An order dismissing an appeal from an order of special term, denying a motion to correct the case.

These orders, clearly, do not come within the class of orders described by subdivision 2 of section 11 of the Code, for neither of them, in effect, determines the action and prevents a judgment from which an appeal might be taken. Nor does subdivision 3 of that section include them. That subdivision authorizes an appeal from a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment. None of these orders was a *final* order in the action. They were all made pending the appeal to the general term, from the judgment entered upon the verdict. One of them is denominated, in the notice of appeal, an order dismissing an appeal from an order *refusing a mandamus*, and is claimed to be an order in a *mandamus* case. That is manifestly a mistake, as all the papers relating to that motion, which are entitled at all, are entitled in this action. This is true of the order to show cause; of the order denying the motion; of the notice of appeal from that order; and of the order of the general term dismissing the appeal, which is the order here appealed from, and it is described in the notice of appeal to this court, which is entitled, in this action, as the order made in this action at a general term thereof, dismissing the appeal from the order of the special term refusing a *mandamus*.

This is the only occasion in which a mandamus is alluded to in the whole course of the proceedings in reference to that motion. The order to show cause makes no allusion to it, and there is nothing in the proceedings indicating that they have, in fact, any reference to a mandamus. It is impossible now to treat them, or the order in which they have resulted, otherwise than as a proceeding in the action.

None of the orders appealed from being final orders are

the subjects of an appeal to this court, and the appeals therefore should be dismissed.

The first subdivision of the section authorizes this court, upon an appeal from a judgment, to "review any immediate order involving the merits, or necessarily affecting the judgment." So that we are brought to the question whether these orders are reviewable under that provision.

The first of these orders, is the order in relation to the retaxation of costs, and the correction of the judgment roll. The appeal from the judgment, I think, brings up this order for review. The question involved is, which party is entitled to costs, and this being a matter of strict legal right, may well be held to involve the merits, as such questions have been treated in the supreme court (St. John *v.* West, 4 *How. Pr.*, 329; Tallman *v.* Hinman, 10 *How. Pr.*, 89). I have no doubt that the motion at general term was decided correctly, and the order therein made, properly affirmed. The plaintiff was entitled to costs. The action is "for the recovery of money," and the plaintiff has in it recovered more than fifty dollars. It is true that the verdict of the jury was for but $10 84. But the action was upon a promissory note for $467 88. The defendant admitted that the plaintiffs were entitled to recover the whole amount of the note, except $150, and interest; and as a condition of putting the cause over the circuit, upon his motion, imposed by the court, stipulated that the plaintiffs might enter judgment for the amount so admitted, without costs, the cause to proceed as to the amount of $150, and all other matters in controversy in the action. Judgment was entered upon the stipulation, and subsequently the action was tried at the circuit, upon the claim of the $150, and resulted in a verdict for $10 84. The plaintiffs, in the judgment entered upon the verdict, recited the entry of the former judgment, and having had their costs of the action adjusted, inserted them also in the judgment. The defendant insists that the judgment should be the ordinary judgment upon a verdict, omitting all reference to the former judgment, and that he is entitled to costs, and not the plaintiff. The case is within both the letter and the spirit of the statute, which give costs to the plaintiff "in an action for

the recovery of money, when the plaintiff shall recover fifty dollars." This the plaintiffs have done in this action. It is to be remembered that the defendant had offered to the plaintiffs judgment for the amount of the demand, less $150, and interest, which had been declined. At the time of the giving of the stipulation, the question of costs rested upon the reducing the recovery to the amount offered. If the plaintiff should recover any part of the $150, they would be entitled to full costs, and that question of costs constituted the "other matters in controversy" reserved in the stipulation from being affected by the judgment to be entered thereon.

In regard to the correction of the judgment, it follows that the order of the special term was right, so far as any question of substantial right is concerned, if the order as to costs was correct. As to any formal correction, whether it should have been made or not, was a question of practice, and is not reviewable here.

The second order complained of, is the order dismissing the appeal from an order of special term, denying a motion that the judge who tried the cause re-settle the case by re-inserting therein the following words: "The defendant requested the court to charge the jury, that if they find from the evidence that the saw was not as warranted, the return of it absolved the defendant from the payment of the price. The court refused so to charge, and defendant excepted." And the third order, of which a review is sought, is the one dismissing an appeal from an order of the special term, denying an application to the court to correct the case, by inserting the same matter.

Whether the general term was right or not, in holding that these orders were not appealable, becomes entirely immaterial, in the view which we take of the case upon the merits, as well in respect to the decision of the special term, sought to be reviewed by the appeal to the general term, as to the judgment itself. The action was upon a promissory note for $467 88. The defence was, that the note was given for circular saws, which were warranted to be of a good quality; that they were not of a good quality, but entirely worthless. Upon the trial no question was made upon the breach of

warranty, except in relation to one of the saws purchased, the price of which was $150. The uncontradicted evidence showed that the saw was sold by the defendant to John Howard & Co., of Michigan, and sent to them; that they, upon trial, finding it bad, had sent it to the plaintiff in New York, as directed by defendant, in case it should be so found, and again received it from the plaintiffs, after it had been re-tempered and reduced an inch in diameter, but not choosing to try it again, they sent it to defendant at Sandy Hill, of whom it was purchased by Brown & Anderson, of Michigan, and sent to them, though not by defendant's personal order. There is no other evidence in this case showing any return of the saw to the plaintiff. Upon this state of facts the refusal to charge as requested was, if it occurred, clearly right. The saw remained with defendant and he had sold it instead of returning it to the plaintiff as worthless; so that his request to charge "that, if the jury found that the saw was not as warranted, the return of it absolved the defendant from the payment of the price" was based upon an assumption of facts wholly unwarranted by the evidence, and his exception to the refusal could avail him nothing.

If then, we should conclude that the orders were, in their nature, appealable, so that the general term ought to have considered them on the merits, seeing, as we do, that the motions before the special term were properly denied, and that the effect of the dismissal of the appeals is precisely the same upon the judgment under review, as an affirmance of the orders would have been; the error in the mode of arriving at the result, if there was one, is, as the case now stands before us, manifestly of no consequence.

We are brought, then, to a consideration of the exceptions taken upon the trial of the cause.

The jury were instructed, that if from the evidence they should find a warranty of the saw, and a breach of that warranty, and that the saw was worthless as a saw, the plaintiffs were entitled to be allowed the value of the saw as old iron or steel. The defendant excepted to this charge, and requested the court to charge that, if the saw was worthless as a saw, the defendant was entitled to a verdict. This the court refused to charge, and the defendant excepted. The jury found for the plaintiff

only the value of the saw as old iron or steel; that is, they found a warranty, the breach, and that the saw was worthless as a saw, a verdict the most favorable possible to the defendant, unless they had taken the view insisted upon by the defendant, that, if the saw was worthless as a saw, the defendant was entitled to a verdict.

The court, I think, was right in the instruction given. There had been no disaffirmance of the contract by the defendant, and when he was sued, as he was, for the price of the saw, which he had retained, he could only recoup his damages for the breach of the warranty.

The warranty, whether considered as express or implied, was nothing more than a general warranty of quality, and the rule of damages for the breach of such a warranty is well settled to be the difference between the value of the goods, if they had corresponded with the warranty, and their actual value (Muller *v.* Eno, 4 *Kern.*, 606; Voorhees *v.* Earl, 2 *Hill*, 288; Cary *v.* Gruman, 4 *Hill*, 625); or as stated in Cary *v.* Gruman, upon the breach of the warranty of the quality of an article, the vendee is entitled to "such sum as, together with the cash value of the defective article, shall amount to what it would have been worth, if the defect had not existed." That is what the jury were directed to give in this case.

I do not discover any foundation, either in justice or in law, for the distinction which the defendant's counsel contends for, between the case when the article is wholly, and that when it is only partially unfit for the use for which it was intended, provided in each case it has some intrinsic value. In the one case, equally with the other, if the article has been retained by the vendee, he should, in estimating his damages, allow the vendor for the actual value of the article, and this is the doctrine of the cases.

There being no warranty that the saw was fit for any specific use, there is no opportunity for the application of the rule, that the vendee is entitled to such damages, beyond those contemplated by the rule above stated, as were the natural and necessary consequences of the breach, which has been applied to cases, when the warranty has been so specific. (Passenger *v.* Thorburn, 35 *Barb.*, 17; *S. C.*, 34 *N. Y.*,

634.) It is only to such cases that this rule has been applied. It was said in Hargous *v.* Ablon (5 *Hill*, 473): "A warranty or promise concerning a thing, being general, that is to say, not having reference to any purpose for which it is to be used out of the ordinary course, the law does not go beyond the general market in search for an idemnity against its breach." See also Milburn *v.* Belloni (34 *Barb.*, 607). The offer to show the damages which the defendant had sustained, consequent upon the failure of the saw to operate, was therefore properly overruled.

There was no error in the admission of the testimony of the witness Lorick, as to the value of the saw as old iron or steel. He had been in the business of manufacturing saws thirteen years, and for an equal length of time before had been a blacksmith, and was familiar with the material and quality of saws. These facts were, at least, *primâ facie* sufficient to show him competent to speak of the value per pound of old iron or steel, and of the weight of such a saw. That the evidence itself is competent, appears from what has already been said in regard to the propriety of allowing the value, shown by it, to the plaintiffs in the estimate of damages.

As the jury found a warranty and the breach already mentioned, it is unnecessary to examine the exceptions arising upon the admission or rejection of evidence with reference to the fact of the warranty. Whether those rulings were right or wrong, they have not prejudiced the defendant.

Upon the whole case, we are of the opinion that the judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed.

SHEEHAN *against* HAMILTON.

Court of Appeals; January, 1866.

LEGAL AND EQUITABLE REMEDIES.—MERGER.

In an action by one claiming under the grantor in a perpetual lease made subject to a rent charge, brought to recover possession of the premises, upon the ground of a breach of the condition to pay the rent, where the defendant claims an extinguishment of the rent charge by a technical legal merger, the plaintiff may rebut that defence by showing that in equity no merger has taken place.

It is not necessary, under the Code of Procedure, in such a case, that the plaintiff should resort to a separate action of an equity nature, to have the existence of the rent charge declared. The whole merits of the controversy may be tried in the action to recover possession of the land for the non-payment of the rent, notwithstanding the facts relating to the alleged merger would have been, before the Code, of equitable cognizance.

The cases upon the union of legal and equitable remedies established by the Code of Procedure, reviewed.

The rule that although there is a unity of two estates in one possession, yet no merger will take place if the circumstances show an intent to maintain the two interests distinct, applied in a peculiar case.

Appeal from a judgment of the General Term of the Supreme Court for the Fourth District.

The facts are sufficiently stated in the opinion of the court.

J. A. Shoudy, for the appellant.

L. B. Pike, for the respondent.

By the Court.—LEONARD, J.—This action was tried in the court below, without a jury, in Saratoga County. Its object is to recover the possession of a lot of land in the village of Saratoga Springs, demised by a perpetual lease from Harmon Livingston to Risley Taylor, in 1823, upon the condition that

Taylor and his heirs and assigns should pay to Livingston, his heirs, executors or assigns, the sum of twenty-five dollars annually; with authority to re-enter in case of its non-payment.

Livingston assigned this rent charge, in 1829, to Doctor John Clarke, the father of the plaintiff, who died in 1846, having devised it to the plaintiff and her two brothers. The brothers assigned their interest to the plaintiff. The rent having remained unpaid for several years, the plaintiff, in 1862, served a notice of her intention to re-enter; and payment of the rent being still neglected or refused, she brought this action.

The defendant is in possession as a tenant under John H. White, who claims to hold by an absolute title in fee, relieved of the rent charge, by deed from Doctor Clarke to Polly Taylor, the widow of Risley Taylor, executed in 1831, and by several intermediate conveyances from her to the said White. The judge before whom the action was tried, in the Supreme Court, at a special term, found as a fact that Doctor Clarke did not intend that the rent charge should merge in the fee when the land was conveyed to him, and as a conclusion of law that there was no merger; and also that the defendant was estopped, by the deeds under which he claims to hold, from setting up a merger.

Judgment was ordered that the plaintiff recover possession, unless the rent be paid; and judgment was thereupon so entered.

The evidence was entirely documentary, except a few formal facts which were agreed on by the parties.

Upon appeal, the general term of the Supreme Court, in the Fourth District, very fully reviewed the facts, and held that the rent charge was extinguished by the unity of possession of the fee in the rent and in the land, in Doctor Clarke, resulting from a conveyance of the land to him in 1831, by the foreclosure of a mortgage made by Risley Taylor; that as this was in the nature of a common law action, the court could not look outside of the deed to him to ascertain whether it was his intention to extinguish the rent; that the inquiry whether such intention existed at the time

of the conveyance could be raised only in equity; and that the law presumed that Doctor Clarke intended to pass all his estate and interest in the land, in the absence of express terms in the deed from him to Mrs. Taylor, showing an intention to pass a less estate; and the general term reversed the judgment rendered by the special term, and ordered a new trial.

The plaintiff, appealing to this court, has stipulated that judgment absolute be rendered against her, if the order appealed from be affirmed.

The opinions delivered by two of the justices of the Supreme Court, at general term, concede—one of them expressly, the other by implication—that it was the intention of Doctor Clarke to keep the rent charge in existence, but deny the right to consider that fact, because it is necessary to invoke a principle of which, it is supposed, a court of equity can alone take cognizance, while the case at law admitted only of the application of common law rules.

This objection lies at the threshhold of the case, and may as well be first examined. It means, in substance, that the plaintiff must resort to a separate action, of an equity nature, to have the existence of her rent charge declared, before she can maintain her action to recover the possession of the land for the non-payment of the rent.

The Constitution vests the Supreme Court with general jurisdiction in law and equity. (*Const., Art.* 6, § 3.) That court has all the jurisdiction of the late Court of Chancery. The testimony in equity cases is to be taken in like manner as in cases at law. (*Id.*, § 10.) It is declared by the Code of Procedure that it is expedient "that the distinction between legal and equitable remedies should no longer continue." *Vide Preamble to the Code, and* § 69.

The Code permits parties to interpose any defences by answer which they may have, "whether they be such as have been heretofore denominated legal or equitable, or both." (§ 150.) No reply to an answer is necessary unless it sets up a counter-claim, but the plaintiff is permitted to prove any matter in denial or avoidance of the answer, where it sets up new matter, as the case may require. (§ 168.) It is upon

the defendant's motion only that a reply to an answer setting up new matter, not constituting a counter-claim, may, in the discretion of the court, be permitted. (§ 153.)

A defence purely equitable may be interposed to a cause of action strictly legal. (Foot *v.* Sprague, 12 *How. Pr.*, 355; Hunt *v.* The Farmers' Loan & T. Co., 8 *How. Pr.*, 418; Hinman *v.* Judson, 13 *Barb.*, 629.)

It is no longer allowable to bring an action merely for the purpose of restraining the prosecution of another action. (Auburn City Bank *v.* Leonard, 20 *How. Pr.*, 193.) A defence that a deed absolute on its face was intended as a mortgage, is available in any action. (Despard *v.* Walbridge, 15 *N. Y.*, 379.)

All matters are considered as equitable defences which would have authorized an application to the Court of Chancery for relief against a legal liability, but which at law could not have been pleaded in bar. (Dobson *v.* Pearce, 2 *Kern. R.*, 1668.)

This whole subject was fully examined in this court in the case of Phillips *v.* Gorham (17 *N. Y.*, 270), in which it was held, in an action for the recovery of the possession of land, that the plaintiff could attack a deed under which the defendant claimed title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance.

The answer, in the case of Phillips *v.* Gorham, claimed title by deed from William Phillips, the ancestor of the plaintiff. There was a reply to the answer (then permitted by the Code), which set up that William Phillips, the ancestor, was of unsound mind when he executed the deed, and that it was fraudulently obtained by threats and other improper influences operating on his impaired intellect.

The objection was taken at the trial that the plaintiff was not entitled to avoid the deed for fraud or undue influence, but should have procured a judgment declaring it void, in an action for that purpose, before bringing the action to recover possession of the land.

The plaintiff had a judgment and verdict, notwithstanding the objection; and on appeal to this court that judgment was

affirmed, and the principles of equity and law combined on the trial of that action were fully upheld.' It is unnecessary to travel over the same ground now at any greater length.

The case of Dobson *v.* Pearce *(supra)* was referred to as invoking the same principle, and was approved.

These references sufficiently show that the plaintiff in this action might lawfully establish upon the trial any ground of avoidance, whether of a legal or equitable nature, against the technical rule insisted on by the defendant, that there had been an extinguishment of the rent charge. She was not obliged by her pleadings to anticipate that the defendant would deny her claim for rent, or set up that it was extinguished; nor was she required to resort to a prior action in equity to have her rent charge declared to be an existing estate.

Was there an avoidance of the technical extinguishment of the rent by the union of the two estates in Doctor Clarke, by competent evidence of his intention that it should not be extinguished?

The judge at the trial has found that it was not intended that the two estates should merge, and that there was no merger. The term "merge" is not used with strict accuracy, inasmuch as the estate in the rent charge and that in the land are of equal degree, and estates of equal degree do not merge. (*Bouvier's Law Dic., tit., Merger.*)

There is a unity of possession where two estates of equal degree meet, or are combined in the same person.

The meaning is, however, substantially the same, whether the result be called a merger or an extinguishment; and as applied by the learned justice, at special term, cannot be misunderstood. It is equally comprehended, whether he says that there was no intent to merge, or no intent to extinguish, the rent. The term merger was probably used in its common acceptation, in this instance.

The master's deed to Doctor Clarke was in the usual form, and would have conveyed a fee if the mortgagor had possessed one. It conveyed, in fact, only such an estate as Risley Taylor owned; that, we have seen, was subject to the payment of an annual rent. There was then an unity of possession in

Doctor Clarke of the fee of the rent charge and of the land, and the rent became thereby extinguished, unless it was his intention that it should be kept alive.

Doctor Clarke conveyed the same estate to the widow of Risley Taylor very shortly after he had acquired it, by a quit-claim deed in which it is stated that he conveys as fully and amply as he had received the title by the deed from the master, to which an express reference is made. While it is true that these deeds are sufficient to pass a clear and unencumbered title to the land in fee simple, they are not inconsistent with a different intention, if it can be shown by legal evidence that such different intention actually existed.

The objection much relied on by the defendant arises from the statute which provides "that every grant of real estate, or any interest of the grantor, unless the intent to pass a less estate or interest shall appear, by express terms, or be necessarily implied in the terms of such grant." (1 *R. S.*, 748.)

All the estate of Doctor Clarke is deemed to have passed by the grant. (Nicoll *v.* The New York and Erie R. R. Company, 12 *N. Y.*, 2 *Kern.*, 129.)

The deed from Mrs. Taylor, made in March, 1832, about four months only after she had received the title by the deed from Doctor Clarke, conveying the premises to Selah Hart, incorporated the lease from Harmon Livingston to Risley Taylor by a reference to and recital of it; and declared that the premises were subject to the rent and covenants of the original lease. All the subsequent deeds to John H. White contain the same recital of the lease and statement that the premises are subject to the rents and covenants therein contained.

The consideration expressed in the master's deed to Doctor Clarke is $960, and the deed from him to Mrs. Taylor is for the consideration of $990, while in the short time of about four months she conveyed, for the consideration of $2,500, to Selah Hart.

The statements and recitals of Mrs. Taylor's deed are clear admissions of the highest grade of evidence that the rent charge had not been previously extinguished.

It was an admission that affected the value of the premises, unfavorably reduced the price, and entered into the considera-

tion paid by the purchaser. It would not have been made, according to the usual motives of human action, unless it had been in accordance with the existing actual fact.

We shall give due force and effect to the admission contained in Mrs. Taylor's deed only, by holding that the omission to limit the estate granted by the deed from Doctor Clarke to her so as to continue and preserve the rent charge by express language, was the result of accident or mistake.

The statute relied on by the defendant creates no bar to the reformation of a deed on the ground of accident or mistake. (*Story's Eq. Juris.*, § 156, *et seq.*)

The failure of a contract or deed to express the real intention of the parties, by reason of accident or mistake, also forms an exception to the rule that parol evidence shall not be admitted to vary the effect of a written instrument.

On these grounds courts of equity interfere to reform any written instrument as between the original parties, and those claiming under them in privity. (*Story's Eq. Juris.*, § 165; Carver *v.* Jackson, 4 *Peters' R.* 1, 83.)

The deed of Mrs. Taylor, and also that from Selah Hart, her grantee, were recorded long before White had acquired the title, and in the deeds of both Mrs. Taylor and Selah Hart the lease is recited and the premises are stated to be subject to the rents and covenants thereof. White acquired title in 1852 under a master's deed on a foreclosure sale of mortgage made by Nelson Hart, the grantor of Selah Hart. He also received a conveyance of the same land subsequently from Nelson Hart, in which the lease is recited.

White was thus in privity of estate, and was bound by the admissions of the former owners. The title and they bind those who succeed them in the estate. (1 *Greenleaf's Ev.*, §§ 189, 190.) Like the case of a prior mortgage, the grantee and his assigns are estopped by the admission in the deed from denying its existence. (WRIGHT, J., Horton *v.* Davis, 26 *N.Y.*, 495; Jumel *v.* Jumel, 7 *Paige*, 591.)

The judgment of the special term was correct and should be affirmed; and that of the general term reversed with costs.

BRUSH *against* LEE.

Court of Appeals; January, 1867.

EXECUTION.—ATTORNEYS.—EXCEPTION.

Execution upon a judgment of a district court of the city of New York, which has been docketed in the New York Common Pleas, may be issued by the attorney of the judgment creditor. It is not required to be issued by the clerk.

There is no rule precluding an attorney from entering into agreement with one who is not an attorney, to enter his office and act as his clerk, and compensating him by giving him an interest in the business. An execution issued in the name of the employer, is not invalid because it was in fact issued by a clerk so employed.

It is an error of law, reviewable upon appeal to the Court of Appeals, for a court to find a fact of which no proof whatever is made.

But to render the objection available in the Court of Appeals, the proper exception must be taken in the court below, on behalf of the party injured. If the fact found, if true, sustains the judgment appealed from, and no exception appears to have been taken to the defect of proof, the Court of Appeals will affirm the judgment, however deficient the proof may be.

Appeal from a judgment.

In March, 1860, one Edmonds obtained a judgment in a district court of the city of New York, for about eighty dollars, against the plaintiff's testator, for which an appeal was taken, but without the requisite steps to stay execution. A transcript of the judgment was docketed with the clerk of the court of common pleas, and an execution issued by A. B. Clark, an attorney for that court, to whom the judgment had been assigned by Edmonds, to the sheriff of the city and county of New York, where the testator then resided, and where he had ample personal and real property to satisfy the same. Nothing was done by the sheriff upon this execution. A transcript of the judgment was shortly after docketed in Kings County, and an execution issued to the sheriff of the latter county by defendant Niles, not an attorney, but a partner with Clark in law business, in the name of Clark as attorney, upon which latter

execution real estate in Brooklyn was levied upon and sold, and bid off by Edmonds for about $100, being of the value, over and above incumbrances thereon, of about $10,000. The testator was entirely ignorant of the issue of either execution, and of the sale of the property in Brooklyn, and continued to receive the rents of the property until his death, March 18, 1863. The testator believed that the necessary steps had been taken, and the execution stayed by the appeal.

Edmonds, shortly after the sheriff's sale, sold the certificate of the sale to defendant Lee, who paid therefor the amount of the bid; and the property not having been redeemed, either by the judgment debtor or any incumbrancer, at the expiration of the time for that purpose, he obtained from the sheriff a deed of the property sold, but which was not placed upon the records for some time thereafter.

In the summer of 1863, the plaintiff, to whom the property sold, had been devised in trust, having learned the facts of the sale and conveyance by the sheriff, commenced this action to have the sale and conveyance adjudged void, for the reason that it was a cloud upon his title; basing his claim to such relief upon the ground that the execution was void, having been issued by the attorney; and that Niles had used the name of Clark in issuing the execution; and, also, that Niles and Lee had been guilty of fraud in issuing the execution, and concealing the sale and conveyance by the sheriff.

The court, upon trial at special term, found as matter of fact that the defendant Niles fraudulently concealed from the testator, his acts in the premises, and that defendant Lee was a party to such fraudulent concealment after becoming assignee of the certificate; and, as a conclusion of law, that the execution was void upon the ground that it was issued by the attorney of plaintiff, and not by the clerk; and gave judgment declaring the sale and the sheriff's deed void, and ordering the cancellation of the same.

The defendants took several exceptions to the decision as to the findings of fact, and of law, but no exception raising the point that there was no evidence whatever of fraudulent concealment.

After entry of judgment, the defendants appealed to the

general term in the first district, and after affirmance by that court appealed to the court of appeals.

Mr. Barrett, for respondent.

Mr. Dyett, for appellant.

GROVER, J.—The special term erred in holding as a conclusion of law, that the execution should have been issued by the clerk, and not the party or his attorney. Section 68 of the Code, among other things, provides that sections 55 to 64, both inclusive, shall apply to the justices' courts of the cities, with the following among other exceptions: "and except, also, that in the city and county of New York, a judgment of twenty-five dollars, or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as, and be deemed a judgment of, the Court of Common Pleas for the city and county of New York." This, it would seem, could leave no doubt but that such judgments were to be enforced in the same manner as judgments rendered by the court of common pleas of the city. The Code provides that these latter judgments shall be enforced by executions issued by the party or his attorney. It will be seen, that it is by the 13th clause of section 64 that provision is made for the issuing of executions upon judgments of justices of the peace, where transcripts have been filed with county clerks by such clerks. The exception in 68, referred to above, does not make this clause applicable to the city and county of New York, but expressly provides another mode for the enforcement of the judgment. The execution was rightly issued by the attorney.

There is nothing in the objection that the execution was issued by Niles, who was not an attorney, in the name of Clark. There is no rule of law or of public policy precluding an attorney from entering into an agreement with one not an attorney to enter his office and act as his clerk, compensating him therefor by giving him an interest in the business. In such a case, the attorney is responsible to the courts, and to

all interested, to the same extent he would be if all the business was done by him personally.

The exception to the proof offered upon the trial as to the amount of the property of the testator was not well taken, for the reason that such proof could have no possible bearing on the case one way or the other. The party had just as clear a right to issue the execution to Kings County, and collect it there, if the testator had millions of property in New York, as he would have had if he had none there. This right so to do was perfect in either event. (*Code*, 287.) It is clear that the rights of the defendants could not in any way be affected by such evidence; and where this is the case, an exception to the evidence is unavailing.

It is clear, that but for finding of the fact, by the court at special term, that the defendants fraudulently concealed the issuing of the execution to Kings County, and the sale and conveyance of the property by the sheriff, the judgment should be reversed and a new trial ordered. If that fact was correctly found, it authorizes the judgment rendered.

No exception that there was no evidence of such fraud was taken by the defendant. Had such exception been taken, the question whether there was or was not any such evidence could have been reviewed in this court. It is error of law for a court to find a fact of which there is no proof whatever. But to make such error available in this court, the proper exception presenting it must be taken to the court below, as this court, upon appeal, except in special cases regulated by statutes, reviews only questions of law passed upon by the court below. I make these observations, lest an affirmance should be regarded as an approval of the finding of fact by the special term in this case.

I have perused the case, and am wholly unable to see how such a finding can be sustained. Neither Edmonds, his attorney, nor Lee, was under any obligation to inform the testator or his attorney of the issuing of the execution, or of the levy and sale of the property. It was the business of the testator and his attorneys, either to stay the execution upon the appeal, or protect his property, wherever found, from its operation. The judgment creditor had the right to collect his

judgment in the mode pointed out by law; and if the testator had real estate in Kings, or any other county, it was no fraud upon him to collect the debt out of such property, although he had ample personal property in the city of New York, out of which such judgment might have been collected. So long as the creditor, his attorneys and agents do no affirmative acts tending to mislead the debtor, and prevent him from protecting his property from sale, or redeeming real estate if sold, there is no ground for imputing fraud, and charging the consequence thereof upon the creditor or purchasers at sales.

But, as above stated, the finding of facts cannot be reviewed in this court. There is no exception that there was no evidence thus presenting it as a question of law; and it is not claimed, nor can it be, that it may be reviewed in this court as a question of fact upon the weight of evidence.

The general term might, and perhaps would, have reversed this finding of fact, had it not adopted the erroneous conclusion that the execution was void, not having been issued by the clerk; but this court has no means of knowing this. It is concluded by the record as it is. The appellant should have procured from the general term a reversal of the finding of fact, if that was its conclusion, before appealing to this court; and then it would have appeared that the judgment was based solely upon the ground that the execution was void, and then the reversal of the judgment now would have followed. But, as the record now stands, the judgment must be affirmed.

All the judges concurred in the result.

A majority held that the statute does not require the execution in such a case to be issued by the county clerk.

Judgment affirmed.

LAKE *against* THE ARTISANS' BANK.

Court of Appeals; January, 1867.

When, upon trial of a cause at circuit and before a jury, the court, on motion of defendant when the plaintiff rests, dismisses the complaint, and the plaintiff excepts, it is competent for the judge to order the exception to be heard, in the first instance, at general term.

Where, on an appeal founded on such an exception, it clearly appeared that the court had decided the cause upon a wrong issue, and had omitted to notice a fact material to the plaintiff's case,—*Held*, that the exception ought to be regarded as sufficient to warrant the appellate court in reviewing the decision.

An indorser who pays the amount of a note to a holder, under a mistaken belief, founded on statements of the holder, that he, the indorser, has been duly charged, or that a prior indorser has been, may, on discovering that he was not so charged, maintain an action to recover back the amount paid.

To constitute a voluntary payment within the rule that a voluntary payment cannot be recovered back, it must be made with a full knowledge of all material facts.

Appeal from a judgment.

This action was brought by James W. Lake against the Artisans' Bank. The object of the action was, to recover an amount which the plaintiff, as indorser of a note held by the bank, had paid, under circumstances which are indicated in the opinion of the court.

PARKER, J.—This action was tried at the circuit, before the court and a jury; and upon the plaintiff's resting his cause, the court, upon the defendant's motion, dismissed the complaint, to which the counsel for the plaintiff excepted, and the judge ordered the exception to be heard, in the first instance, at the general term.

I think the general term of the Supreme Court was right in regarding the case as properly before it for decision. The exception was one taken upon the trial, and is, I think, within

the class of exceptions mentioned in section 265 of the Code, which the judge may order to be heard, in the first instance, at the general term. The dismissal of the complaint, in this case, was only equivalent to a nonsuit, and raises the same questions (Coit *v.* Beard, 33 *Barb.*, 357; Lomer *v.* Meeker, 24 *N. Y.*, 363). The action (subd. 1) is as follows: "A motion for a new trial on a case, *or exceptions*, or otherwise, and an application for a judgment on a special verdict, or a case reserved for argument or further consideration, must, in the first instance, be heard and decided at the circuit, or special term, except that where *exceptions* are taken, the judge trying the cause may, at the trial, direct them to be heard, in the first instance, at the general term, etc."

Now, if a motion for a new trial on exceptions, where a nonsuit is granted, the only exception being to the nonsuit, is within the provisions of this section (and it cannot, I think, be doubted that it is), it is equally clear, that an exception taken to a nonsuit may be ordered to be heard, in the first instance, at the general term.

What, then, is the effect of the exception taken? Does it bring up for review the question whether there was any thing for the jury to decide, or only the question whether the legal conclusion drawn from the facts which the evidence tended to prove, was the correct one?

In regard to any fact which may be drawn from the evidence bearing upon the ground of the nonsuit, no doubt the plaintiff is concluded, and such fact is deemed to have been assumed by the judge with the consent of the plaintiff. The nonsuit was upon the ground that the defendant was the owner of the note, and under no obligation to the plaintiff to charge his prior indorser. All the facts which the evidence tends to prove bearing upon this question, we must deem assumed by the judge with the plaintiff's consent. But assuming the court correct in holding that the plaintiff had no cause of action against the defendant for negligence in omitting to charge the prior indorser, still there is another question raised by the pleadings and the evidence; and that is, whether the plaintiff did not pay the note to the defendant under such a mistake of facts as to entitle him to recover back the money

paid. This question was entirely ignored by the court at the circuit, although it is a prominent issue in the case. The evidence is by no means so slight in favor of the plaintiff, upon this issue, that we can reasonably conclude it was assumed and conceded to be against him; it is, on the contrary, very strongly in his favor. It would be carrying the rule too far, I think, to hold in such a case, that the court did assume and the plaintiff concede the facts bearing upon this issue, which was not all considered by the court to be against the plaintiff. The case was so evidently decided by the court upon a wrong issue, that I think the exception to such decision should be deemed sufficient upon a review to enable the appellate court to afford an opportunity for the correction of the error.

The plaintiff clearly ought not to have been nonsuited in the case. He was not on the 27th of July, when he paid the note, under any legal liability to pay it, for he had not been charged as indorser, and it was then past due.

It is said he waived want of notice by the act of payment. True, he did, if he paid with knowledge that he had not been charged (Tibbetts *v.* Dowel, 23 *Wend.*, 379). But it is very questionable whether he did pay with such knowledge. The cashier told him that the note had been protested, and that he had charged over the amount to him. This was equivalent to an assertion that he, the plaintiff, had been legally charged as indorser, as he might have been without his knowledge, having been absent from his residence and place of business when the note matured and several days after (Coddington *v.* Davis, 1 *Comst.*, 186). True, the note and two notices of protest from the notary, one directed to him and one to Bates, the prior indorser, were, at the time he was so informed by the cashier, delivered to him with the note. But this was entirely consistent with the fact which he understood from the cashier. The bank being the owner of the note might have preferred to send its own notices.

But even if he did pay, knowing he had not been charged as indorser, still, did he not, as he swears he did, pay under the belief induced by the statement of the cashier, that Bates had been charged? The evidence that he did so pay it, is so strong that the fact is almost undeniable. There is nothing to

contradict it, but the delivery to him of the notices, as above stated. It is not credible that he paid the note to the defendant, which there was no obligation on him whatever to pay, knowing that he was not liable, and that his prior indorser, the only other solvent party to the paper, was also discharged by the neglect of the defendant to charge him.

If, then, he paid it under the mistake above mentioned, in respect either to his or Bates having been charged as indorser, there can be no doubt that he was entitled to recover (Waite *v.* Leggett, 8 *Cow.*, 195; Wheadon *v.* Olds, 20 *Wend.*, 174; Chester *v.* Bank of Kingston, 16 *N. Y.*, 336).

That would not have constituted a "voluntary payment," for the payment, if so made, was not made with full knowledge of all the material facts.

The supreme court at general term should have set aside the nonsuit, and ordered a new trial. The judgment must therefore be reversed, and a new trial ordered, costs to abide the result.

All the judges concurred.

Judgment reversed.

DAINESE *against* ALLEN.

Supreme Court, First District; General Term, January, 1867.

INJUNCTION.—JURISDICTION OF AMERICAN CONSUL ABROAD.

An injunction may be granted by a State court to restrain persons from prosecuting a claim before an American Consul abroad, where the Consul has not jurisdiction of the proceedings instituted before him.

Neither the treaties of 1830 and 1860, between the United States and Turkey, nor the Acts of Congress respecting Consuls operate to confer upon American Consuls residing in Turkey, jurisdiction to adjudge civil causes.

Appeal from an order continuing an injunction.

This action was brought by Francis Dainese to obtain an injunction restraining the defendants, the members of the firm of R. H. Allen & Co., from prosecuting proceedings against him, before the defendant Charles Hale, an American Consul at Alexandria, Egypt.

The plaintiff is a citizen and resident of the District of Columbia. In 1863, while at Alexandria, he, through an agent in New York, ordered certain goods sent to Egypt. The defendants Allen & Co., merchants in New York, undertook to fill the orders. They sent goods to Egypt, and claim that Dainese became indebted to them on account thereof to the amount of about £1,000.

In November, 1864, Dainese having then left Egypt to return to the United States, the defendants Allen & Co., through an agent in Egypt, commenced proceedings in the nature of a civil suit before the defendant Hale, as United States Consul, to recover the balance alleged to be due to them. The Consul, on the application of the agent of Allen & Co., issued an attachment against the goods of Dainese and took possession of them, notifying debtors not to pay him. Notice of these proceedings was given to Dainese in Washington in August, 1866, and he was notified to appear before the Consul in Egypt and defend the suit in October, 1866.

A temporary injunction was granted by Justice BARNARD, which was afterwards ordered, by Justice CLERKE, to be continued. From that order defendants Allen & Co., now appealed.

Eaton, Tailer & Newell, for appellants.

Charles F. Blake & S. J. Glassey, for respondent.

By the Court.—CLERKE, J.—1. Even if the judicial authority was vested by the conjoint consent of the Government of the United States, and that of the Ottoman Porte in the American Consul at Alexandria, still it would not be the judicial power contemplated in the third article of the Constitution of the United States.

The power contemplated by the Constitution is that which

is possessed and exercised by regularly organized tribunals within the territory of the United States; in which actions are prosecuted and justice administered by judges especially appointed, according to an established procedure, and in a regular and formal manner.

The authority given to executive officers to exercise judicial functions incidentally or occasionally, is not that judicial power to which the third article of the Constitution has reference. Therefore, a State court will not refrain from interfering with persons prosecuting a claim before an American Consul in a foreign country, where the consul has no jurisdiction of such claim, or exercises an authority to which he has no right.

2. As a general rule, if a party has an adequate remedy at law a court of equity will not interfere by injunction. But it is sometimes difficult to determine whether he has an adequate remedy, particularly where an injury may be suffered through the instrumentality of judicial proceedings in a foreign country; and, therefore, as Lord BROUGHAM says in Carron Iron Company *v.* McLaren (5 *Ho. of L. R.*, 438), "if a suit instituted abroad appears ill-calculated to answer the ends of justice, the court of chancery will restrain the foreign action."

3. At the time the proceedings under consideration were commenced before the consul, he had no jurisdiction in civil cases.

There are only two treaties, I believe, between the United States and the Ottoman Porte in which the latter has delegated any portion of judicial authority to the consuls of the former.

The treaty of 1830, does undoubtedly grant to them, in certain cases, criminal jurisdiction, but nothing more.

The treaty of 1860, has the following provision: "It is moreover expressly stipulated that all rights, privileges and immunities, which the Sublime Porte now grants or may hereafter grant to or suffer to be enjoyed by the subjects, ships, commerce or navigation of any other foreign power, shall be equally granted to, exercised and enjoyed by the citizens, vessels, commerce and navigation of the United States of America."

It is contended because the consuls of other nations have

exercised jurisdiction in civil cases in Turkey, that this provision delegates the same jurisdiction to American Consuls. It does not contain a single word relative to consular authority of any description. It relates solely to privileges allowed to private individuals, and to commerce and navigation. Before we can decide that a nation parts with any of her sovereign authority, the language by which it is transferred should be direct and unequivocal. From the language quoted, it is evident that no such design was ever the subject of negotiation.

Nor do I think Congress has conferred any such authority upon consuls, although if it had, the authority would be ineffectual without the concurrence of the Ottoman Porte. As we have seen that this concurrence has not been yielded, it is scarcely necessary to examine the acts of Congress relating to this subject with any particularity.

By the act of 1860 (12 *Stat. at L.*, 72), judicial power is conferred on consuls in criminal matters, and in civil cases, with such powers as consuls in China possess as far as the same are permitted by the laws of Turkey or its usages in its intercourse with the Franks or other christian nations.

By the treaty with China the jurisdiction of consuls in civil cases is confined to questions between citizens of the United States resident in China.

Neither party in the proceedings before the consul in Alexandria resided there at the time they were commenced, or at any time since.

It is unnecessary to pursue this examination any further, as we have seen that the Ottoman Porte has never yielded any jurisdiction in civil cases to American Consuls.

On the whole, I think this injunction ought to be continued. We have jurisdiction over the persons of the defendants. It is a proper case for the exercise of that jurisdiction; and the prosecution of the proceedings before the consul at Alexandria is calculated to be productive of gross injustice.

Order affirmed, all the judges concurring, with costs.

McKEE *against* THE PEOPLE.

Court of Appeals; January, 1867.

NEW TRIAL.—EVIDENCE IN HOMICIDE.

The former decision of the Court in this cause (32 *N. Y.*, 239) approved.

The power conferred on the Court of Appeals by Laws of 1855, ch. 337, as amended Laws of 1858, ch. 330, to grant a new trial in certain criminal cases, although no exception was taken below, is confined to cases tried by the Court of General Sessions for the city and county of New York. It does not extend to causes tried in a Court of Oyer and Terminer.

The rule for determining what is sufficient evidence of premeditation to convict for murder—stated.

Upon a trial for murder, conversations had in the presence and hearing of the prisoner, at the time of the homicide, and tending to explain the prisoner's state of mind, may be given in evidence, as part of the *res gestæ*.

It is not error for which a criminal conviction will be reversed, that the judge, who tried the cause, denied a motion to strike out evidence which was wholly immaterial.

An expression of opinion, by the presiding judge, upon the weight or bearing of the evidence submitted to the jury, is not matter of exception.

Appeal from a judgment of the Supreme Court on a conviction for murder in the first degree.

The facts are stated in the opinion.

Scott Lord, for plaintiff.

J. H. Martindale, attorney-general, for defendants.

DAVIES, Ch. J.—At a Court of Oyer and Terminer, held in the county of Livingston, in the month of February, 1863, the plaintiff in error was convicted of the crime of murder in the first degree, and sentenced to be executed on the third day of April, then next ensuing.

The homicide was committed on the 18th day of November, 1861. On the 9th day of March, 1863, a writ of error was brought upon said judgment to the Supreme Court, and at

a general term thereof, held on the 16th day of December, 1863, the judgment was affirmed; and on the 31st day of December, in the same year, the writ of error, upon this latter judgment, was brought to this court.

The cause was argued in this court at the January term thereof, held in 1865.

We then held, that the sentence passed upon the prisoner was clearly erroneous, and in conformity with the provision of the act of April 24th, 1863 (this court, upon that occasion, being of the opinion that the conviction of the prisoner had been legal and regular), directed the record to be remitted by the Oyer and Terminer, to pass the sentence prescribed by the act of 1860 (32 *N. Y.*, 239). Upon this argument, no question was made that the trial and conviction of the prisoner had not, in all respects, been legal and regular. Nay, this court understood the learned counsel for the prisoner to concede, upon that argument, that it had been.

At the September term of this court, held in 1865, an application was made, on behalf of the plaintiff in error, to this court, for a re-argument, on the ground that errors had intervened on the trial prejudicial to the prisoner, and which, in the opinion of his counsel, were sufficient to procure a new trial, and which had not been urged on the former argument, for the reason that it was supposed the point relied on was fatal to the conviction, and would, of itself, insure the discharge of the prisoner.

Under the peculiar circumstances presented, this court ordered a re-argument; and the court have now heard all the suggestions of counsel, deemed important for the consideration of this court. We do not propose to review the questions discussed and decided upon the former argument. They are there carefully considered, and received the general approval of the members of the court. Those questions then passed upon must be regarded as finally settled, and not open to further discussion. (Ratzky *v.* The People, 29 *N. Y.*, 124). There remain to be considered the points now made by the counsel for the prisoner, on this re-argument, and urged as reasons why this conviction and judgment should be reversed.

qui tacet consentire videtur, was applicable to verbal conversations where there was a statement made in a party's presence, which was not denied by him. In such case the party had an opportunity to deny the statement at once, and not doing so, there was good reason for supposing he could not controvert it." The statement made by the prisoner's wife in his presence, of what she had told him, was clearly admissible (Lewett *v.* Banning, 21 *N. Y.*, 27).

Joseph Meakly, the father-in-law of the prisoner, was called to prove various acts and declarations of the prisoner, tending to show that the prisoner was insane. On his cross-examination, he testified, that upon an occasion mentioned, the prisoner came to the witness's house, and made threats of burning his house and shooting his man, if he, the witness, would not come out of the house. That the prisoner said: "Come out you old coward, I am a little boy." That the prisoner then kept still some time. The witness then remarked: "A week or two before this he had threatened to burn Bailey's barn. I told his wife I would have him taken up." On his re-direct examination the witness testified: "Prisoner was not present when I had the conversation with his wife about the burning of the barn and taking him up; he made no complaint of what I had said to his wife that night; he gave no reason why he was angry that night." The prisoner's counsel moved to strike out that part of the evidence relating to conversation between witness and prisoner; the court denied the motion, and the prisoner excepted. The evidence objected to consists in the statement of the witness, that, in a conversation he had with the prisoner's wife, in reference to a threat of the prisoner to burn a barn, that he, the witness, would have him taken up. As it did not appear that this threatened action of the witness was ever communicated to the prisoner, or that he had any knowledge or intimation of it, it could never have had any influence upon anything the prisoner ever said or did.

It was wholly immaterial and irrelevant, and could not under any theory have worked any prejudice to the prisoner. From aught that appears, he was in entire ignorance that any such threat had ever been made, and no act of his could therefore

have been based upon, or affected by it. The silence of the prisoner on this subject, leads to the inference that his wife had never mentioned the contemplated action of the father to him. The judge might properly have directed the striking out of this testimony, but it was no error for him to refuse to do so.

For the reasons already stated it was wholly immaterial.

The declaration and statements of the prisoner could not be given in evidence, on his own behalf, for any purpose whatever. They certainly could not be to enable the witness to identify the prisoner, and were therefore properly excluded.

We see no error in what the learned judge said to the jury in reference to the testimony of Dr. Bennett. He said to them: "If you find the prisoner, at the time Dr. Bennett was observing him through the hole in the wall, as described by the witnesses, was watching to see whether he was observed, and was regulating his conduct accordingly, it would raise a very strong presumption that the prisoner was feigning insanity, and indeed such evidence of design and calculation on his part, as to be in my opinion entirely fatal to his defence of insanity."

A reference to Dr. Bennett's testimony will show that the circumstances under which he watched the prisoner, were important to determine whether the insanity imputed to the prisoner was feigned or real. The doctor said he was looking through the hole, prepared so that he might observe the prisoner, and was looking through the hole, when the prisoner was put into the west side of the jail. As soon as the sheriff closed the doors, the prisoner walked through the hall, going through the same motions as he had been before; he then walked back towards the hole, and as he did so the witness noticed his eye directed towards the aperture; it could be seen from the inside; he did it two or three times; he came near the aperture, passed to one side, and stood still a moment, he then crossed directly in front of the aperture to the other side—he then appeared to bend forward, and looked into the hole, and dodged back.

The conduct of the prisoner as thus detailed, if he was watching to see whether he was observed, and was regulating his conduct accordingly, was most important for consideration of the jury, on the issue whether the insanity claimed for the

prisoner was real or feigned. If the jury came to the conclusion that the prisoner was watching to see if he was observed, and believed that he was, then his conduct clearly evinced such evidence of calculation and design, as conclusively showed that he was not, at that time, at least, insane. It certainly tended strongly to show that the defence of insanity was not founded upon fact, and the expression of the opinion of the judge, that it was fatal to the defence of insanity, is not a matter of exception. (Carver *v.* Jackson, 4 *Pet.*, 1; Foster *v.* Steele, 5 *Scott*, 28; Belcher *v.* Prithe, 4 *Moore & S.*, 295; Gardner *v.* Picket, 19 *Wend.*, 136; Corn *v.* Child, 10 *Pick.*, 252.)

We see no error in any of the rulings upon the trial, and if the appropriate sentence had been passed upon the prisoner, the judgment would be affirmed. But, for the reasons heretofore given in this case, we reverse the judgment of the Oyer and Terminer, and of the Supreme Court, and in obedience to the mandate of the legislature, we remit the record, to the end that the appropriate sentence upon the conviction may be passed.

The judgment of the Oyer and Terminer and of the Supreme Court, is accordingly reversed, and the conviction of the plaintiff in error, being in the opinion of this court legal and regular, is affirmed, and the record is remitted to the Oyer and Terminer of the county of Livingston, to the end that that court may sentence the prisoner to suffer death for the crime whereof he stands convicted, and that he be confined at hard labor in the State prison at Auburn, until such punishment of death shall be inflicted.

All the judges concurred, except GROVER and SCRUGHAM, who were absent.

Judgment reversed.

MILLBANK *against* THE BROADWAY BANK.

Supreme Court, First District; Special Term, June, 1867.

FILING UNDERTAKING.—OMISSION HOW CURED.

When a plaintiff commences an action without filing an undertaking required by law as a condition precedent to suing, the court may (under section 174 of the Code of Procedure) allow it to be filed *nunc pro tunc.*

Motion for leave to file an undertaking.

This was an action prosecuted by an attachment creditor to collect a demand due from defendants to the debtor in the attachment, upon which the attachment had been levied. The objection was taken that the plaintiff had not filed the proper undertaking; and he now applied for leave to do so.

INGRAHAM, J.—In this case judgment was given on the demurrer for the defendants, because the plaintiff had not, before suit, filed the undertaking required by section 238 of the Code.

The plaintiff now moves for leave to file the undertaking *nunc pro tunc.* The defendants object that this cannot be allowed, because the filing of the undertaking is a preliminary requisite to be done before commencing the action.

The Code, § 174, provides that when any proceeding fails to conform to the provisions of the Code, the court may permit an amendment of such proceeding so as to make it conformable thereto, and supply any omission therein. Section 173 allows any proceeding to be amended by correcting a mistake in any respect. Under this section an undertaking in arrest has been amended, (12 *How. Pr.*, 381); and an undertaking on attachment. (10 *Abb. Pr.*, 424.)

Under these provisions and decisions I think this motion may be granted. The filing of the undertaking was a neces-

sary step to be taken in bringing the action, and the omission to file it may be supplied. The plaintiff must pay all the costs on the demurrer and the costs of this motion.

THE PEOPLE *against* BRANDRETH.

Court of Appeals; January, 1867.

SET-OFF.—ACTIONS BY THE STATE.

One who advances money to an agent or officer of the State not authorized to borrow money on the credit of the State, acquires no claim, legal or equitable, against the State for repayment, which can be the subject of set-off in an action brought by the State against him; even though the money was required and used by the agent or officer in the performance of his duty as such.

Whether, in any case, an individual sued by the State, can interpose a set-off or counter-claim,—*query?*

Appeal from a judgment of the Supreme Court.

The action was brought by the People against Benjamin Brandreth, and six others, upon their bond, dated May 28, 1860, conditioned that the Bank of Sing Sing should repay all moneys deposited with it to the credit of the treasurer of the State.

The cause was tried at the Westchester Circuit, in September, 1864. The plaintiffs proved the bond in suit.

It was upon the condition "that the Bank of Sing Sing shall well and truly pay, or cause to be paid, to the treasurer of the State of New York, all moneys deposited, or which may hereafter be deposited, to his credit as treasurer, &c., in the Bank of Sing Sing, by the agent and warden of the Sing Sing prison, upon presentation to the Bank of Sing Sing of the drafts or checks of the said treasurer.

The defendants admitted that between May 30, and Sept.

18, 1860, moneys were deposited in the Bank of Sing Sing, by the agent and warden of the Sing Sing prison, of which $29,000 and upwards remained on deposit on September 3, 1860; on which day the treasurer drew on the bank for the balance, and payment was refused and the draft protested.

To sustain their defence, the defendants offered to prove the following facts.

1. That the State was indebted to the Bank of Sing Sing in the sum of $17,372 27, with interest from Dec. 22, 1854.

2. That the bank was insolvent.

3. That this indebtedness arose from moneys borrowed by the agent and warden of the Sing Sing prison, which were necessary and were used for obtaining supplies of food for the inmates of the prison.

The plaintiffs' counsel objected to this evidence and the court excluded it, "solely on the ground," as the case stated, "that in an action by the State to recover money, no counter-claim or set-off could be allowed."

The court directed judgment for the plaintiffs, which was affirmed upon appeal to the general term of the Second District. From the judgment of affirmance the defendants now appeal.

Lyman Tremain, for appellants.

J. H. Martindale, for respondents.

GROVER, J.—The question principally argued by the counsel for the appellant is not, I think, necessarily involved in the decision of this case. That question is, whether, in actions brought by the people, counter-claims or set-offs can be interposed by the defendant, the same as in actions prosecuted by individuals. Neither do I think it necessary to determine whether the defendants were at liberty to avail themselves of an indebtedness to the bank in this suit. The evidence offered and rejected, upon the trial, did not tend to show any indebtedness, legal or equitable (in a legal sense of the latter term), of the State to the bank. The offer was, to show that the State Prison, at Sing Sing, had borrowed money from the bank, and had expended the same in purchasing supplies

and food, &c., for the prisoners. This was the counter-claim set up in the answer, and this was what the defendants offered to prove, and all they offered to prove.

The case states, that the evidence was rejected on the sole ground that, in an action by the State to recover money, no counter-claim or set-off can be allowed; to which ruling the defendant's counsel excepted. It is clear, that error cannot be predicated of the ground assigned for a ruling, or upon which it was made, when it appears clear that any different ruling upon the question would have been erroneous. In the present case, if the evidence offered and rejected, in no possible view had a tendency to show any counter-claim by the bank against the State, its rejection was proper, and it was wholly immaterial to the defendants upon what ground it was based. This applies only to cases where it is impossible to obviate the difficulty on trial.

It only remains to show, that the evidence offered had no tendency to show any counter-claim, either at law or in equity, in favor of the bank, against the State. This appears, from the total want of authority of the agent of the prison to borrow money on the credit of the State. It was not pretended that any such authority was conferred by any act of the legislature, even if that department of the government could confer such power upon him. (See *Const.*, Art. 10, § 8.) Nor did any other department of government pretend to give him any such authority. All that appears is, that the agent wanted money for the use of the prison, and the banks loaned it to him. He had no color of authority to borrow upon the credit of the State. If he had, every canal superintendent—indeed, nearly every administrative officer—possesses the same power. If this be so, it is utterly impossible to preserve any control over the State finances. It is clear, that the agent had no power to borrow the money. His so doing created no equitable or legal claim against the State, cognizable by the courts. The claim is entirely analogous to that of a party who should expend money to improve the real estate of a non-resident owner, without his knowledge or assent. He would have no claim to reimbursement that could be enforced at law, or in equity. His only remedy would be to lay the facts before the owner,

and be content with what he was willing to give. So in the present case, should the State consent to become suable on claims by individuals, no action for this claim could be maintained by the bank. Its only remedy is an application to the legislature, and it must content itself with what that body may deem justice in the premises.

Meantime this debt of the bank to the State, for which these defendants have become sureties, should be promptly paid. The judgment appealed from should be affirmed.

BOCKES, SCRUGHAM, WRIGHT and DAVIES, J. J., concurred.
For reversal, HUNT and PORTER, J. J.

HUNT, J., dissenting. (After stating the facts)—It is quite clear, that the evidence offered by the defendants did not establish a technical set-off. It failed in the indispensable qualification of not being a "demand due to the defendants in their own right." (2 *Rev. St.*, 353, 366.) It was in form, as asserted, a demand due to one not a party to the suit, to wit, the Bank of Sing Sing. It failed as a counterclaim, substantially, for the same reason. It was not a demand "arising on a contract and existing in favor of the defendants against the plaintiff." (*Code*, § 150.) Conceding these propositions, I am yet of the opinion that the court erred in excluding the evidence offered.

Viewing it as a question between individuals, the case before the court was simply this: The defendants were sureties that the Sing Sing Bank would pay to the People, on draft, all the money that should be deposited to its credit by the warden of the prison. There was a balance due on such deposits of $29,000. The bank, however, had advanced to the People, through the same warden, the sum of $17,000; and if the bank had been the defendant in the present suit, instead of the sureties, no more than the difference between the two sums—to wit, $12,000—could have been recovered. The sureties are claimed to be liable for their principal in the sum of $29,000, while the principal himself is liable in the sum of $17,000 only.

Every man's sense of equity revolts at this proposition.

It is inequitable and unjust, that a surety, always regarded with favor, should be compelled to occupy a position of greater liability than his principal. In a court of law, where justice is administered by rigid rules, and forms sometimes endanger right, the defendants would be embarrassed by the existence of the propositions laid down by the court below, that this defence was not a set-off, because it was not due to the defendants in their own right; and that it was not a counter-claim, because it was not a demand existing in favor of the defendants, against the plaintiffs.

No such embarrassment, however, exists in a court of equity, where powers are sufficiently extensive, always to apply a remedy where a clear injustice is discovered to exist. Independently of all statutes, courts of equity, in virtue of their general jurisdiction, grant relief in cases of mutual debts or credits (*Story Eq. Jur.*, § 1435). Thus, where there is a legal debt upon one side, and an equitable debt upon the other, and where special circumstances exist requiring such interposition, a joint debt may be set off against a separate debt, or a separate debt against a joint one (§§ 1436, 1437). "So if one of the joint debtors is only a security for the other, he may in equity set off the separate debt due to his principal from the creditor, for in such case the joint debt is nothing more than a security for the separate debt of the principal; and upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security, without allowing what he has received on the separate account, for which the other was security." (*Id.* § 1437. See also *Exp.* Harrison, 12 *Ves.*, 345; *Exp.* Stephens, 11 *Ves.*, 24.)

The bank is assumed by the proposition to have been insolvent, and if the defendants were compelled to pay this amount, the same could not be collected from the bank, though admitted to be a just debt. The defendants would be remediless.

The application of these principles relieves the case from technical difficulties, and entitles the defendants to make the proof offered. (See also Gillespie *v.* Torrance, 25 *N. Y.*, 306; *Code*, § 150, last clause, as to the form of the defence.)

Had the parties to this action been individuals instead of

the State being plaintiffs, upon the doctrine established by these authorities there would have been error in excluding the defence offered.

It is claimed, however, that when the State is the plaintiff, a different rule prevails, and that no demand can be set off against an established claim of the State, until it is audited by the proper accounting officers, pursuant to some statute. In their argument upon this point, the plaintiffs insist that a demand against the State is not a debt, in the sense that it can be set off, and that it is at the most a "mere claim upon legislative conscience and discretion."

I cannot assent to this standard of estimating the obligation of a State or nation. The certain liquidated obligation of a State is governed by no lower rules, to say the least, than govern the obligations of individuals. It is in no sense a question of discretion nor of conscience, except of that good conscience, which requires the rigid performance of acknowledged duty. If payable at a day named, the State is then bound to meet its obligation, and if held by the citizens of a foreign country, its non-payment is just cause of war. A failure to pay, whether to its own citizens or to strangers, subjects it to a disgrace, which can only be removed by a removal of the cause. Repudiation by a nation is the equivalent of fraudulent bankruptcy by an individual. It is true that a State cannot be sued, but this only makes more imperative the duty, properly to meet all its pecuniary engagements.

Honor, morality, and duty, require it to perform its promises; and the fact, that it cannot be arraigned in its own courts, can furnish no justification for its refusal.

Nor am I aware of any rule of law which requires the obligation of a State to be submitted to its own auditing officers before it becomes perfect. Should the State expressly enact to that effect, it would then become a question whether such enactment did not enter into the contract and form part of it. But as no such statute has been referred to, we are not called upon to examine that question. The offer here was to prove "an indebtedness to the State" in the sum named, and if an auditing constituted an essential element of an indebtedness, proof of such auditing would be included in the offer made.

Although a State cannot be sued, I think it is subject to a set-off, like individuals, when it comes into court as a plaintiff, and that both upon principle and authority. When it becomes a suitor, it waives, for the time, its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the court, and to its practice and its proceedings. For this purpose it is like an individual or an inferior corporation; and becoming voluntarily a party to a suit, no good reason can be given why it should not be bound by the same rules that are applicable to other parties, in the same position. (State of Illinois *v.* Butterfield, 8 *Paige*, 535; United States *v.* Arredondo, 6 *Peters*, 711, 712; The same *v.* Bank of Metropolis, 15 *Peters*, 377.) To the same effect is the statute (3 *Rev. Stat.*, 553 *m*), which enacts that where suits are brought in the name of the People, they "shall be subject to all the provisions of law, respecting similar suits and proceedings, when instituted in the name of any citizen, except where provision is or shall be otherwise expressly made by statute; and in all such suits the People shall be liable to be nonsuited, and to have judgment of *non pros.* or discontinuance entered against them, in the same cases, in like manner and with the same effect as in suits brought by citizens, except that no execution shall issue thereon." The State is subject to the same rules of pleading and evidence, to the same practice, will submit to be dismissed from court where an individual would be, subjects itself to a liability for costs, and makes no reservation whatever, except in the single instance that execution shall not issue against it. The costs are directed to be paid by the Comptroller upon production of the payment of the judgment record, and the certificate of the Attorney General (*Ib*). I have no doubt that this statute does, and was intended to subject the State to a set-off, where a set-off would exist against an individual plaintiff.

The plaintiff seeks to sustain the judgment of the court below upon the further ground that the prison warden had no right to contract any debt with the bank for the purpose mentioned, and that therefore the evidence was properly rejected. If the evidence had been admitted, it could have been readily ascertained whether there was an indebtedness against the

state which would properly form the subject of a set-off. We have no means of knowing what the evidence of the defendants could be. They offered to prove that "the State was indebted to the bank in the sum of $17,377 27, as alleged in the answer," and the answer alleged the indebtedness to have arisen from money furnished by the bank to the prison warden, for the purposes of the prison. They also offered to prove that "the same indebtedness arose from moneys borrowed by the agent of the prison, which were necessary and were used for supplies of food for the inmates of the prison." If in any possible form, or under any conceivable circumstances, an indebtedness could have arisen from this advance of money, then the evidence of the defendants was improperly excluded. It will be observed that the offer does not state that the claim of indebtedness consists in or of the facts stated, but that it "arose" from these facts. If the legislature, upon a full statement of the facts, had directed the payment of the money through the comptroller or treasurer, and these officers had issued their draft or acceptance promising to pay it, I doubt not that this promise would have been an indebtedness to the State, and arising out of the transaction in the answer referred to, and would have constituted a valid set-off. Possibly a much less formal recognition would have made it a debt against the State. The defendants are entitled to every possible assumption in favor of the evidence offered to be produced by them.

It is urged, in this connection, that this defence was not available, because the bank was not a party, and would not be bound by any statement of its indebtedness thus to be made. To this, as well as to the entire objection of the want of power to create a debt which we are discussing, it is a sufficient answer, that no such objection was taken below.

The rule is, that no dilatory objection can be urged, here, which was not taken at the trial; and the present instance illustrates the wisdom of the rule. If it had been claimed in the court below that the bank was a necessary party, the obvious remedy would have been an order that the cause stand over, for the purpose of making the bank a party. By now allowing an objection, which the party omitted to inter-

pose at the proper time, a valuable right of the defendants would be destroyed.

The plaintiff cannot, therefore, be permitted now to urge it.

The case states, that the evidence was excluded "solely on the ground that, in an action by the State, no counter-claim or set-off can be allowed." The party should be held to this proposition.

I am of the opinion that the court below erred in rejecting the evidence offered, and that a new trial should be ordered.

PORTER, J., concurred in the opinion of HUNT, J.

Judgment affirmed.

THE PEOPLE, *ex rel.*, BEAN *against* RUSSELL.

Supreme Court, First District; Special Term, February, 1867.

WRIT OF PROHIBITION.—SUMMARY PROCEEDINGS.

The court will not issue a writ of prohibition to restrain a magistrate from entertaining a summary proceeding to remove a tenant, merely because the tenant has a clear defence to the proceeding.

If the magistrate has jurisdiction of the proceeding, he must be allowed to hear and decide it. If he decides erroneously upon the merits, the remedy is by *certiorari*, or action for damages.

The presumption of law is, that a judicial officer will decide a question submitted to him, correctly.

Motion for a writ of prohibition.

The relator, Mary G. Bean, apprehending that she might be dispossessed from leased premises, as the result of summary proceedings instituted under the statute, before the relator, as City Judge of the city of New York, now applied for a writ of prohibition to restrain him from entertaining such proceedings.

LEONARD, J.—It is entirely clear, that there is no condition or limitation to the grant of the term. The term granted is one year. It is well settled, that a condition contained in the covenants of a lease, and not embraced in the term named in the grant, does not affect the continuance of the term; but the landlord must, in such case, resort to his action for damages against the tenant, on a breach of his agreement.

But, conceding these positions taken by the counsel for the relator, it does not follow that she is entitled to the writ of prohibition.

Although it is plain that the city judge cannot, in conformity with law, decide in favor of the landlord, he is not thereby deprived of jurisdiction over the proceeding. The question of jurisdiction is settled by the nature of the proceeding, and not by the terms of the contract.

The proceeding is by the landlord, for the summary ejection of a tenant, holding over, as it is alleged, after the termination of the term.

The city judge has jurisdiction to hear that class of proceedings. The claim of the landlord being denied, he is to try the question. The fact, that the term has not expired, does not appear until the tenant has produced her lease in evidence. It is sought to prohibit the city judge from adjudging upon the question of the termination or expiration of the term. It cannot be assumed that the city judge will pronounce an erroneous judgment. The presumption of law is, that he will decide correctly.

The tenant must, I think, wait for the decision; and, if erroneous, she has her remedy, by *certiorari*, to procure a reversal; and also an action for damages, if she should be illegally dispossessed.

The application is denied, with costs.

MATTER OF SCHAFER.

Supreme Court, Special Term; June, 1867.

AWARD.—ENTERING JUDGMENT.

An award of arbitrators cannot be enforced by a judgment, under the provisions of the Revised Statutes, unless it is made pursuant to the written submission.*

Where an award is not made within the time prescribed by the original submission, but within an oral extension, given by the parties, it may be valid as an award, and enforceable by action, but cannot be the basis of a judgment.

Motion for leave to enter judgment on an award of arbitrators.

INGRAHAM, J.—A motion is made to enter judgment on an award of arbitrators. The submission provided a day before which the award was to be made; and, if made in time, authorized a judgment to be entered thereon. No award was made within the time. After the time expired, the parties went to the arbitrators, submitted their case to them from time to time, and the award was finally made. The award is not made in pursuance of the submission as originally made, and cannot, therefore, be enforced by a judgment. But I think the subsequent acts of the parties may be treated as a new submission, by parol, and the award will be valid. This may be enforced by an action in behalf of the party entitled by it to recover, or as a defence, if other claims are made. It is to be treated as an arbitration at common law, and not under the statute. (See 21 *N. Y.*, 148.)

The motion to enter judgment is denied, without costs.

* Compare the case of Godsell *v.* Phillips, *Ante*, 147.

CRAIG *against* WARD.

Court of Appeals; March, 1867.

FORMER ADJUDICATION.—WHO ARE BOUND.

R. brought a suit against the present defendants and D., to set aside a sale in foreclosure, for fraud affecting the title under which the mortgage was given. While the action was pending the present plaintiff bought the mortgage. R. afterwards recovered judgment that the sale was void for fraud in the mortgage.—*Held*, that the report of a referee, and the judgment in that action, were admissible on behalf of the plaintiff in the present action, which was to recover damages for fraud in inducing the plaintiff to buy the mortgage; and that they were conclusive on the defendant, as to the facts adjudged.

Where a person makes a false statement, not knowing that it is false, but knowing facts sufficient to put him upon inquiry, he is liable for the consequences, to the same extent as if he had actual knowledge.

Appeal from a judgment of the supreme court.

The action was brought by John Craig against William H. Ward and Charles L. Clarke, to recover damages for fraudulent representations made by the defendants to the plaintiff, in support of the validity of a mortgage given by one Davis to Ward, by which representations plaintiff was induced to buy the mortgage.

On the trial, the plaintiff, to show that the mortgagor had not a good title, and that the mortgage was not a lien, gave in evidence the report of a referee, and a judgment founded thereon, in an action brought by Elizabeth M. Rathbone against William Stebbins and the defendants in this action, and others; one object of which action was to have certain proceedings to foreclose a mortgage older than hers, declared void. The complaint in that action alleged that the mortgage impeached was given to defraud Mrs. Rathbone out of her security, and was without consideration; that the mortgagor and others were not made parties to the proceedings of foreclosure, and prayed among other things, that the same might be declared void. The referee found that the mortgage was without consider-

ation in the hands of Ward, and was executed by Davis for the fraudulent purpose stated, and that the mortgage and foreclosure were void. The judgment was in accordance with this report, and adjudged that the sale (under which Davis obtained his title) was void.

The defendant objected to the introduction of this report and judgment roll, but the court held that the record was conclusive evidence of the facts directly adjudicated or necessarily involved in the determination.

The plaintiff purchased the mortgage now in suit, while the action brought by Rathbone was pending.

The jury found for the plaintiff; and the judgment upon the verdict was affirmed by the general term. The defendants now appealed from the judgment of affirmance.

W. F. Coggswell, for appellants.

T. R. Strong, for respondent.

HUNT, J. (after disposing of an unimportant question of variance).—The admission of the record in Rathbone against these defendants and others, as evidence in the present suit, is made the most serious cause of objection by the defendants. Mrs. Rathbone brought her action against the defendants and one Davis, alleging that the title which Davis obtained under a certain foreclosure, and which title was the foundation of the mortgage in the present suit alleged to be fraudulent and worthless, was void, on account of various frauds and defects therein alleged. She obtained judgment according to her prayer, and among other things it was adjudged that the "said foreclosure sale is utterly void." While that suit was pending, the plaintiff purchased of the defendants in that suit, the mortgage upon which the present questions arise. It is not denied that the judgment was conclusive as between Mrs. Rathbone and the defendants, not only in that suit, but wherever the question might fairly arise between them. The objection is that that judgment did not assume, and did not, in fact, make any adjudication as between the defendants themselves, but only as between them and the plaintiff therein; and further, that the present plain-

tiff is not a party to that suit, and it is not competent for him to have the benefit of that adjudication.

The general rule is, that all are bound by a judgment who had a right to be heard therein and all who are in privity with them; and that all who are bound by a judgment are entitled to the benefit of it against parties to it or their privies (1 *Greenl. Ev.*, §§ 522, 523). Castle *v.* Noyes (14 *N. Y.* [4 *Kern.*], 329), involved the same general principles as the present case. Castle claimed the property in suit under a mortgage from the former owner, and the defendant claimed under an execution against the same owner. A suit had before been brought by the defendant against one Ronk, a servant of the plaintiff's testator, for taking away a portion of the same property, alleging fraud in the mortgage. This action was, in fact, defended by Castle's testator, who assumed the defense of his servant. It was held that the judgment in favor of the servant in the former suit was conclusive in the present suit, in favor of Castle. The court say: "It is by no means true that, in order to constitute an estoppel by judgment, the parties on record must be the same. The term has a broader meaning. It includes the real and substantial parties who, although not upon the record, had a right to control the proceedings and appeal from the judgment. In this sense the plaintiff's testator was clearly a party to the former suit, and as he would be bound by the result, so he or his representatives may insist that the determination is conclusive upon his adversary." And if one covenants for the result or consequences of a suit between others, as that a certain mortgage assigned by him shall produce a specific sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive against him" (Rappelye *v.* Prince, 4 *Hill*, 119).

Greenleaf thus explains it: "Under the term *parties*, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings, and to appeal from the judgment" (1 *Greenl. Ev.*, § 523). The general doctrine is, that the person who represents another, and

the person who is represented, have a legal identity; so that whatever binds one in relation to the subject of their common interest, binds the other also (*Id.*, § 536). A record is also evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced (2 *Stark. Ev.*, 195; *Cow. & H. Notes to Phill. Ev.*, 569). It is provided by statute that, in an action affecting the title to real property, the plaintiff may file with the county clerk a notice such as was filed in the present case, and that every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he was made a party to the action (*Code*, § 132; 4 *Cow.*, 667; 11 *Wend.*, 442). I doubt not that such subsequent purchaser would be entitled to make himself a formal party defendant, if his interests required it, and to conduct a defense in his own name, although a purchaser of a mortgage interest only The plaintiff was thus a party in interest in that suit—a substantial privy of this vendor, and his rights as assignee of the mortgage are as effectually cut off by Mrs. Rathbone's judgment and decree as if he had been named as party defendant in her suit.

I do not find in the cases any such qualification of the rule that defendants are bound by a judgment to which they are parties, as that this effect is not produced as between themselves. The rule is general and reciprocal. Its object is to produce that "*finis litium*" which the law so greatly desires, and with so much difficulty finds. The plaintiffs and the defendants, and each plaintiff and each defendant, and as between each plaintiff and each defendant, find here an estoppel upon every question involved in the judgment. There is no such limitation as the defendants contend for, and a defendant can claim the advantage of the termination of the controversy against his co-defendants, in the same manner as against a plaintiff.

There is another objection arising upon the charge of the judge, which it is necessary to consider. The judge

charged the jury that if the representations made to the plaintiff were untrue, although the defendant Ward did not know that they were so, yet if he was informed and knew of facts which in the exercise of common sense and ordinary prudence were sufficient to put him on inquiry, and would have led him to a knowledge of the condition of the title, he would be liable the same as if he had actual knowledge. The representation which gives the cause of action was, "that the mortgage was *bona fide*, was all secured, and as straight as a string; that Davis had a clear title to the land; and that this was the first incumbrance;" while it was proved that the mortgage was worthless, and that Davis had no title. This representation was made by the defendant Clarke, not by Ward in person. The proof was clear that Clarke was informed of everything respecting the condition of the mortgage, and understood all the facts in regard to it. The negotiation for the sale of the mortgage by Ward to the plaintiff was made by Clarke, as the agent of Ward, and the knowledge of the agent was the knowledge of the principal. Upon the case as it was presented by the proof, the charge was right, and I am inclined to the opinion that it is right in the abstract. Bennet *v.* Judson (21 *N. Y.*, 238), is cited to sustain the charge, but goes much farther. In that case the proposition is laid down broadly that "one who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud as much as if he knew it to be untrue." This destroys the distinction between fraud and negligence, which I suppose to be well established, and I am not prepared to reiterate it in a case which does not require it. I concur fully in the proposition laid down at the trial of that case, that having *received the fruits of the bargain*, the defendant was liable for the fraud of his agent, although he did not authorize the statement, or know that it was made, or whether it was true or false. That rule was all that the facts required, and all, therefore, that was really decided.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

CURRAN *against* THE WARREN CHEMICAL AND MANUFACTURING COMPANY.

Court of Appeals; January, 1867.

ACTION FOR CAUSING DEATH.—DISMISSAL OF COMPLAINT.—PRESUMPTION.

In an action by an administrator to recover damages for causing the death of his intestate, if it appears from the plaintiff's evidence that the negligence or wrongful act of the deceased contributed to cause his death, defendant is entitled to have the complaint dismissed. *Per* BOCKES, J.

There is no presumption of law that the owner of premises upon which a death by accident occurs, is chargeable with fault or negligence in respect to the cause of death, or with liability therefor. To charge him with damages, circumstances under which the injury occurred must be proved, showing some wrongful act or omission on his part.

Appeal from a judgment.

The facts are stated in the opinion.

BOCKES, J.—This action was brought by the plaintiff, as administratrix, under the act of 1847, and its amendments, which give compensation in case of the death of a person occasioned "by wrongful act, neglect or default."

The defendants, a manufacturing company, were engaged in the distillation of coal-tar, and in the manufacture of oils, as benzole, benzine and naphtha.

The deceased, a son of the plaintiff, was a boiler-maker in the employ of a firm engaged in the construction and reparation of boilers, and was sent by his employers to the defendants' manufactory to repair their boiler. To prosecute the work, it was necessary to labor on the inner surface by the light of lamps, entering through an orifice opened for the purpose.

On the day of the disaster, the deceased labored as he had done for several previous days, until twelve o'clock, then went

to his dinner, from which he returned in about a half hour, entered the boiler, and fell dead almost instantly, in consequence of inhaling foul and poisonous gas, which had accumulated during his absence. It does not distinctly appear where and how the foul gas had its origin. On this point, the parties supported different theories from the evidence. On the part of the plaintiff, it was insisted that it was generated in the adjoining still—the entire works comprising six—and escaped into the boiler where the deceased labored, through some imperfection in the works, or by reason of inattention and want of care in the defendants' agents and servants in permitting this result.

On the part of the defendants, it was maintained that the gas was generated in the boiler itself, by reason of the combustion of the lamp, and the respiration of the laborers therein; and further, that, wherever it had its origin, the deceased himself contributed to the danger, and actually caused the catastrophe, by closing or directing the closing of the ventilator attached to the boiler, and which operated as a safety-valve for the escape of noxious gases.

There was no dispute but that there was such ventilator, and that safety to the laborers within the boiler required it to be generally, if not at all times, open while the work was progressing; nor is there any dispute but that the deceased, in the forenoon of the day of the disaster, directed and caused it to be closed.

In this view of the case, and, in my judgment, none other can fairly be taken, the learned judge should have nonsuited the plaintiff at the close of the evidence, as he was requested to do; for, on the conceded or undisputed facts, it stood established, that the deceased, by his own careless, negligent and wrongful act, contributed to the cause which produced his death. It seems plain, beyond peradventure, that the closing of the ventilator prevented, in a very great degree, the escape and diffusion of the noxious vapor, and caused it to accumulate; and its unusual collection and concentration, thus produced, was the immediate cause of the injury complained of.

But if it be admitted that a case was made for the con-

sideration of the jury, then it was submitted to them, in one respect, upon a wrong theory. The general tone of the charge was undoubtedly correct. The jury were instructed that they were to consider the ordinary hazards and risks of the employment, whatever they were, as having been voluntarily assumed by the deceased; that when a man engages in a dangerous enterprise, he accepts its ordinary risks, and is bound to foresee and submit to the consequences which usually attend it. They were also correctly instructed, that, in order to recover, the plaintiff was bound to show that the deceased came to his death without fault on his part, and through the negligence, carelessness or wrongful act of the defendants, their agents or servants. But they were also told that, under the facts proved in this case, the defendants must explain how this man came to his death; that, since the plaintiff had shown that the deceased was killed on the defendants' premises, in their factory, under their exclusive control, that the burden of proof was cast upon the defendants to explain how that death came, and that they must satisfy them (the jury) that it was caused without any fault on their part, or be responsible in damages. It was also charged, that, inasmuch as the death occurred on the defendants' place, where they were in the exclusive occupation and control of it, as matter of law the defendants were liable, unless they could explain the cause; that, when a man has been killed or has died on the premises of a party charged with a wrong in that regard, without assignable reason for it that can be seen, such person is bound, in order to discharge himself from liability, to show that he is not to blame for such death. And, again, the judge remarked: "Now, upon that question" (the question how deceased came to his death), "the burden of proof, as I have told you, is with the defendants, to show how this man came to his death, *because it took place on their premises;*" and it is added, "it is not necessary, as I can see, for the plaintiff to show you the precise manner or theory of his death." There are other paragraphs in the charge of similar import.

These instructions were obviously erroneous. The mere fact of an injury or death on the premises of a party, in his

possession and under his control, raises no presumption of wrong against such party. The circumstances under which the injury occurred must still be proved, showing a wrongful act or omission of some duty on the part of the person sought to be charged, in order to establish a liability. The simple happening of an injury on one's premises, raises no presumption of wrong on his part, any more than would the happening of an injury in his presence or under his observation. The burden of proof, in all cases of negligence, is on the plaintiff.

It was held in Holbrook *v.* Utica & Schenectady R. R. Co. (12 *N. Y.*, 236), that when a passenger on a railroad is injured, the burden of proving that the injury was caused by the negligence of the company, or its servants, rests upon the party seeking to recover damages therefor; and that the mere fact that a person is injured while riding in a railroad-car, does not impose upon the company the burden of disproving negligence. Judge Ruggles properly remarks, the presumption arises from *the cause* of the injury, or from other circumstances attending it, and not from the injury itself. So, in the case under examination, if indeed it was a proper one for them, the jury should have been directed to examine into the cause of the death, with a view of determining the defendants' liability, instead of starting with a presumption of wrong, from the fact that the deceased died on the defendants' premises. The charge of the judge was manifestly wrong in a very essential particular. It cast the burden of proof where it did not belong, and permitted the jury to hold the defendants to a liability not warranted by the facts on which it was supposed to rest.

The order of the general term, reversing the judgment and granting a new trial, was clearly right, and should be affirmed. The defendants are also entitled to judgment absolute in their favor, according to the stipulation.

DAVIES, HUNT, SCRUGHAM, PARKER and GROVER concurred in the conclusion arrived at, on the last point discussed in the opinion.

PORTER, J., was for reversal.

WRIGHT, J., expressed no opinion.

MATTER OF WILLIAMSON.

Supreme Court, First District; Special Term, June, 1867.

HABEAS CORPUS.—COMMITMENT.

It is no longer necessary, in order to sustain a commitment upon a conviction in a court of Special Sessions in the city of New York, that the record of the conviction should be filed in the County Clerk's office.

Habeas Corpus.

John Williamson, having been sent to the House of Refuge upon a conviction in a court of special sessions in the city of New York, was brought before the court on a writ of habeas corpus. The objection taken to the detention, appears in the opinion.

INGRAHAM, P. J.—A writ of habeas corpus was allowed in this case and a return is made that the prisoner is held by virtue of a commitment from the special sessions on a conviction before that court. The conviction and commitment appear to be valid, and where that is the case, it is the duty of the magistrate to remand the prisoner.

It is urged that no record of conviction has been filed in the county clerk's office, and therefore the prisoner should be discharged. No such fact appears before me, and even if it did, it is hardly a proper inquiry on habeas corpus, where the statute has made it the duty of the magistrate not to extend his inquiry behind the commitment.

Besides, the necessity of filing the record of conviction on trials before the special sessions has ceased. The act of 1858 (*Laws of* 1858, *ch.* 441, 282, § 5), provides that transcript of convictions shall not be required to be filed, but makes a certified copy by the clerk of the court of special sessions evidence.

A similar provision may be found in the act of 1830, ch. 42.

There are cases where convictions take place before other officers than these holding the special sessions where it is necessary that a record of conviction should be filed. Such, for instance, as that provided for by the 3d section of the act of 1833, ch. 11, where it is to be filed with the clerk of the court of sessions. This, however, does not apply to the court of special sessions.

The prisoner should be remanded.

CLARK *against* FORD.

Court of Appeals; January, 1867.

ADMINISTRATION.—LIMITATION OF ACTIONS.

The successors of a removed administrator, who were also interested in the estate as legatees, filed a petition before the Surrogate, praying an accounting by their predecessor, and that he be ordered to pay over the amount found due. Nearly ten years having elapsed between the removal and the petition, the predecessor pleaded the Statute of Limitations.

Held: 1. That there being no authority for a petition in the two characters of legatee and successor in administration, and the relief prayed being such as could only be given to persons interested in the estate as legatees, the proceeding must be deemed to be instituted by the petitioners in that character.

2. That, so regarded, it was barred by lapse of time.

Appeal from a judgment of the supreme court.

Nathan Ford died in 1829, leaving a will of real and personal estate, which was duly proved before the surrogate of St. Lawrence County, and letters testamentary were granted to the executors therein named, all of whom died on or before April 2, 1842, and letters of administration with the will annexed, were issued to Chilion Ford, the respondent. He was superseded as such administrator on July 13, 1850, and Edwin

Clark and David B. O. Ford, the appellants, were appointed in his place.

On June 16, 1860, the appellants presented their petition to the surrogate of St. Lawrence County, setting forth the above facts, and also stating that there had never been a general accounting by Chilion Ford as administrator; that large sums of money came into his hands which belong to the residuary legatees of said Nathan Ford, or their assignees or representatives; and that the appellant Edwin Clark, was the owner, by assignment, of five-twentieths of the estate, and that the appellant David B. O. Ford, was the owner, as one of the residuary legatees, of one-tenth of the estate, and as assignee, of one-twentieth.

The petition was made by the appellants as such administrators, and in their own right, as such assignees and residuary legatees, and prayed, "that said Chilion Ford may account for all of the property and effects of said estate that came to his possession, and may pay over the same."

Chilion Ford answered, "that he ought not to be required to account, because the time limited by law within which he might have been required to account as such administrator had elapsed long before the commencement of these proceedings, and that none of the claims of the petitioners against him as such administrator had accrued within the time limited by law for the commencement of proceedings to enforce the same, but were barred by the statute of limitations."

The surrogate overruled this answer, and ordered him to render a final account. The supreme court on appeal reversed this order, from which decision Clark and Ford appealed.

SCRUGHAM, J.—In proceedings instituted by a successor of an administrator, to compel an accounting by his predecessor, the surrogate cannot make any decree for the payment or distribution of such part of the estate as may remain to be paid or distributed; but he may do so when the proceedings are taken upon the application of a person having a demand against the estate, either as creditor, legatee, or next of kin (2 *Rev. Stat.*, 95, § 71).

The prayer of the petition to the surrogate was not merely

for an accounting, but also that the respondent should be required to pay over to the petitioners the property and effects of the estate.

The petitioners applied in two characters, as successors of the administrators, and as persons having demands against the estate as legatees. There is no provision in the statute for such joint application, and the character of the proceeding instituted by the petition must be determined by the nature of the relief sought by it. If it had been merely for an accounting, it could be properly regarded as a proceeding by the successors of an administrator, to compel their predecessor to account, but as it sought, besides, a decree of the surrogate which could not be made upon such proceeding, but which might be proper upon an accounting compelled by persons having a demand against the estate as legatees, it should be treated only as a proceeding instituted by the appellants in that character.

The respondent was appointed administrator with the will annexed, on the death of the last executor in 1842, was superseded on July 13, 1850, and the appellants did not present their petition until June 16, 1860.

An action at law is given, by statute, to legatees entitled to share in the distribution of an estate (2 *Rev. Stat.*, 114, § 9), and it may be commenced at the expiration of one year from the granting of letters testamentary, or of administration.

This remedy was barred by the statute of limitations, long before these proceedings before the surrogate were commenced.

Before the Revised Statutes, there was no statutory limitation of the time within which suits might be commenced in the court of chancery, and yet it was uniformly held, that when the claim was one which could have been enforced by an action at law, the statute of limitations which barred the remedy at law, would be applied to the suit in chancery; that the equitable remedy, in a case of concurrent jurisdiction, is subject to the same limitation as the legal. (Murray *v.* Costar, 20 *Johns.*, 576–610; Kane *v.* Bloodgood, 7 *Johns. Ch.*, 91.)

The principles upon which this doctrine was established in courts of equity, are equally applicable to proceedings in surrogate's courts, and it was accordingly held by the late chan-

cellor in McCarter *v.* Camel (1 *Barb. Ch. R.*, 465), that the surrogate could not entertain proceedings to enforce the payment of a distributive share of an estate, which were not instituted before the expiration of the time within which the distributee might have brought an action, under the 9th section of the statute to which reference has been made.

The judgment should be affirmed with costs.

All the judges concurred.

Judgment affirmed.

EBNER *against* BRADFORD.

Supreme Court, First District; Special Term, March, 1867.

ATTACHMENT.—WHEN IT MAY ISSUE.

The attachment authorized by section 227 of the Code of Procedure, is allowable in actions for legal relief only. It cannot be issued in an action for equitable relief;—*e. g.*, an action seeking to have a deed canceled, and an accounting and an injunction and receiver.

Motion to set aside an attachment.

The facts out of which the motion arose appear in the opinion.

S. B. Brownell, for the motion.

George Bowman, opposed.

E. DARWIN SMITH, J.—The complaint in this action states a cause of action purely of an equitable nature; and prays for equitable relief, and a judgment setting aside deeds, and for an accounting, and for an injunction and receiver. The

attachment, given by the Code in section 227, is allowable "in actions for the recovery of money only;" and by the amendment of 1866, "in actions for the wrongful conversion of personal property." This amendment extends the attachment to legal actions, or actions of a legal nature, for the recovery of damages for the value of personal property tortiously taken or converted. It applies, also, to such actions as would have been denominated, before the Code, trover, trespass or replevin. It presupposes a judgment at law for damages, which may be followed by an execution to levy upon particular property. Upon the complainant's complaint, he will not be entitled to any such single judgment.

I do not think the legislature intended to extend the remedy by attachment, to equitable actions.

I know of no case where it has been so held, and think the plaintiff is not entitled to this remedy, in this case, upon the facts stated in his complaint.

The attachment must, therefore, be set aside, with ten dollars costs.

BAXTER *against* DAVIS.

Supreme Court, First District; Special Term, March, 1867.

COSTS.—LIABILITY OF ADMINISTRATOR.

One who, in the capacity of administrator, commences an action for the benefit of the estate, does not become personally liable for costs, by the fact that before judgment, he is removed from the administration.

Motion to set aside a judgment and execution.

The action was brought by George W. Baxter as an administrator, and in behalf of the estate of his intestate, against Arnold A. Davis. Pending the suit, the administrator was re-

moved; after which, defendant, being successful, entered judgment against him personally for costs. This judgment and the execution issued upon it, the plaintiff moved to set aside.

E. DARWIN SMITH, J.—This suit was commenced by the plaintiff as administrator, and had prosecuted for the benefit of the estate. The removal of the plaintiff from the office of administrator did not make it a personal action of his. He is not liable for costs except upon an express order charging him personally for such costs for misconduct.

The judgment was irregular so far as it is a judgment on the plaintiff personally. Plaintiff should have applied to court for costs against plaintiff, personally, before execution of such judgment. The execution must be retained, and the judgment too, with $10 costs; or, if defendant elects, he may divide the judgment so as to charge the costs upon the estate only.

MITCHELL *against* STEWART.

Supreme Court, First District; Special Term, 1867.

REFERENCE.—INJUNCTION.

In an action to open stated accounts and for an accounting, it is premature to apply for a reference, until the question of the right to an accounting has been determined. Until then, it does not appear that any examination of the accounts will be required.

Where executors bring an action to close up the estate, against surviving partners of the testator, and it is alleged that moneys were withdrawn from the firm by the testator during his lifetime, and defendants interpose a counter-claim for the moneys thus withdrawn without their consent, the defendants, upon its appearing that the executors may probably make a distribution of the assets in their hands before the determination of the suit, may have an injunction to restrain them from so doing.

Motion for an order of reference, and for an injunction pending the trial.

Wm. M. Evarts and *Henry Hilton*, for the motion.

Henry A. Cram and *Wm. Mitchell*, opposed.

INGRAHAM, J.—This action is brought by the executors of William H. Burrowes, for the adjustment and settlement of their accounts, and of various claims against the estate, preparatory to a distribution of the assets.

In the course of the proceedings, a claim is presented by A. T. Stewart & Co. for moneys alleged to have been fraudulently taken from the firm, by the testator, to a sum exceeding half a million of dollars.

The cause is at issue, and ready for trial. A commission has been granted, with a stay of proceedings; and, on its return, the action can be tried.

The defendants, Stewart & Co., now move for an order of reference to adjust the amount of moneys alleged to be due to them from the estate of Burrowes, and for an injunction to prohibit the distribution of the funds to the legatees who reside abroad.

In regard to the first matter, the reference—I think the motion is premature.

A question will arise, on the trial, whether the defendants, Stewart & Co., are not bound by a settlement made by them with the executors. If so, the reference would be unnecessary, and the heavy expense attending such a reference would be unnecessary.

A reference cannot be compulsorily ordered, unless the court is satisfied that such an examination will be required for the disposition of the case.

At present, it does not appear that any examination of their accounts will be required.

Besides, in cases of this kind, it is never proper to order a reference until after a trial establishing the plaintiff's claims, or the defendants' defence, it shall appear, that such accounting will be required, and then the same is ordered by the court which tries the cause.

For these reasons, so much of this motion as asks for a reference is denied.

As to the motion for an injunction to restrain the defendants from a distribution of the assets to the legatees, I can hardly think it necessary; for the executors, as a matter of prudence and self-protection, would not, I suppose, venture to distribute their assets, until all claims upon them by third persons are disposed of. If there is any possibility of any such action, the injunction should be granted. The plaintiffs have stayed the trial, by issuing the commission; the amount involved is large; and the legatees mostly live out of the jurisdiction of the court. These reasons are amply sufficient to warrant the order restraining the distribution of the assets until the final decision of the case.

Motion for a reference denied, and injunction granted; costs to abide result.

THE PEOPLE *against* VILAS.

Court of Appeals; January, 1867.

OFFICIAL BOND.—DISCHARGE OF SURETIES.

A judgment of non-suit in a former action, for the same cause, is not a bar to a subsequent action for legal relief.

The sureties of a public officer are not discharged from liability on the bond, by legislation subsequent to the delivery of the bond, which modifies the duties of the office, for the faithful performance of which, by their principal, the bond was given.

The bond of a public officer is understood to be given subject to the exercise of the constitutional power of the legislature to change the duties of the office; and the obligation of sureties extends to the faithful performance of the duties, as they may from time to time be modified.

The fact that the bond, in a particular case refers to a particular statute, as prescribing the duties of the officer, makes no difference.

Appeal from a judgment of the Supreme Court.

The action was brought in the name of the People of the

State against Alden Vilas, and others, as sureties upon the official bond of M. P. Jackson, as loan commissioner of the County of St. Lawrence, for loaning the moneys of the United States deposited with the State.

The bond was dated June 15, 1850. The questions of law that arose upon the trial at circuit were—whether a judgment of non-suit rendered in an action previously brought for the same cause, barred this action—and whether the additional duties imposed upon the commissioner by the act of April 10, 1850, discharged the sureties.

It appeared in the present case that by the operation of that act five hundred dollars was added to the capital of the fund in charge of the commissioners of St. Lawrence County, which, prior thereto, was upward of eighty thousand dollars.

The cause was tried by the court without a jury, and upon the above grounds judgment was rendered for the defendants; which upon appeal to the general term of the fourth district was affirmed upon the latter ground, from which the plaintiff appealed to this court.

J. H. Martindale, attorney general, for appellants.

J. C. Brown, for defendants.

GROVER, J.—Judgment of non-suit in the previous action was no bar. (Brintnall *v.* Foster, 7 *Wend.* 103; Audubon *v.* Ex. Ins. Co., 27 *N. Y.*, 216.) Such was always the rule in actions at law. In equity suits the rule is different. A decree dismissing the complaint, unless made without prejudice, bars a second suit for the same cause.

The real question in this case is whether the addition made to the capital of the fund placed in charge of the commissioners by the act of April 10, 1850, discharged the sureties upon their official bonds. An examination of that act will show that it contains no provision effecting such a result, unless it is produced by this addition thereby made to the capital of the fund. This presents a question of vast importance to the public. It not only affects all the official bonds of all this class of commissioners holding office at the time of the passage of the act, but an examination into the matter would, I think,

show that it affected a great number of official bonds in other cases. This consideration cannot change the law if settled in favor of the sureties, but the obvious inconvenience of a rule working such results requires a thorough examination of the reasons and authority upon which it is claimed to be established. As between private parties, the law is, that any alteration in the obligation or contract in respect of which a person has become surety, without the consent of the latter, extinguishes his obligations and discharges him. (*Burge, Sur.*, 214; *Theobald Sur.*, 132; Whiton *v.* Hall, 5 *Barn. & Cress.*, 269.) And this result follows irrespective of the inquiry whether the alteration could work any injury to the surety or not (Bangs *v.* Strong, 4 *Com.*, 315). The reason upon which this is founded is, that the surety has never made the contract upon which it is sought to charge him. His answer is, if it is sought to charge him upon the altered contract, that I never made any such bargain, and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency the answer furnishes a complete defence. It is claimed by the defendants that the same rule is applicable to official bonds. In this they are right if the reasons apply, and the same answers can be given.

An official bond is a contract with the people for the faithful discharge of the official duties of the officer. In the present case it was that Jackson should faithfully discharge the duties of said commissioner, pursuant to the act entitled, "an act authorizing the loan of certain moneys belonging to the United States, deposited with the State of New York for safe keeping," and should discharge his said duties without favor, malice or partiality. These duties Jackson has not performed, but the securities claim to be discharged on the ground that subsequent to the making of the bond, five hundred dollars was added to the capital of the fund. The duties of the commissioner as to this five hundred dollars were precisely the same as required for the capital of the fund, and precisely those required by the act referred to in the bond. The position of the defendants must go to the extent that any alteration made by the legislature, in the act, affecting the duties of the commis-

sioner, will discharge his sureties. In other words, that the bond is to be regarded as a contract, faithfully to discharge the duties of the office as then prescribed by the act, and that any alteration in these duties made by the legislature subsequently, alters the contract, and hence discharges the sureties. If this position be sound, it follows that no change can be made by the legislature, relative to the amount of money in their hands, the mode of loaning it, their compensation, or their duties in any respect, without discharging their official bonds. It may be remarked that it would not only relieve the sureties upon the bond, but the officer himself, unless it should be held that his continuance in office after the passage of the act making the change, was an assent on his part to such change. The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter, no alteration can be made without the mutual assent of both parties. In the former, the legislature have power at any and all times to change the duties of officers; and the continued existence of this power is known to the officer and his sureties, and the officer accepts the office, and the sureties execute the bond with this knowledge. It is, I think, the same in effect as though this power was recited in the bond. Had this been done, it would not be claimed that the sureties were discharged by its exercise. Had an individual given a guaranty of the faithful performance of a contract by one party, containing a clause authorizing the other to make alterations in certain of its provisions, it would not be claimed that the surety was discharged by alterations so authorized; and yet this is nothing more than the sureties knew the legislature was competent to do in the present case. Why has it never been claimed in behalf of officers who had given bonds for the discharge of their official duties, that a contract had been made with them in relation thereto, unchangeable by the legislature? Simply because it is understood that all these acts are subordinate to the law-making power, and necessarily subject to such changes as may from time to time be deemed expedient. Every official oath is so interpreted. It is not true that one taking an oath to discharge the duties of any office simply swears to discharge them as then prescribed by law, but that he swears to dis-

charge them as they may from time to time be fixed and regulated by the law-making power. So an official bond conditioned for the discharge of the duties of the office, should in like manner be understood, not as restricted to duties as then prescribed by law, but as embracing the duties of the office as from time to time fixed and regulated by the legislature.

It may be said, that although such might be the general rule, yet that the bond in the present case contains a reference to the act, and requires the duties to be performed in accordance therewith. To this it may be answered, that section 3 of the act, providing for giving the bonds and its requisites, requires no such reference; and that the bond in suit, in addition thereto, contains all required by it—that is, the true and faithful performance of its duties—without favor, malice or partiality. The act does not prescribe the amount of money to be placed in, or which shall remain in the hands of the commissioners. In the absence of authority determining the question otherwise, my conviction is, that any alteration, addition or diminution of the duties of a public officer, made by the legislature, does not discharge his official bond, or the sureties thereon, so long as the duties required are the appropriate functions of the particular office; that such alterations are within the contemplation of the parties executing the bond; that imposing duties of another description, and not appropriate to the office, would discharge the sureties, not coming within such contemplation.

The question was regarded by the supreme court as settled in favor of the sureties by a series of decisions. If this be so, it is equally binding upon this as upon any other court. No case holding any such doctrine has been decided by the courts of this State. Neither the opinion of the learned justice, nor the brief of the counsel, contain any reference to any case in this State where the point has been involved, nor have I been able to find any such case. Bower *v.* McDonard (1 *Eng. L. & Eq.* 1), was a case between private parties, a bank and its agents, where the duties and responsibilities of the latter were increased by the bank; and has, therefore, no application to the present case. The same may be said (The North-Western Railway Co. *v.* Whitney) of a contract between the company

and its agent. In Oswald *v.* Mayor, &c. (26 *Eng. L. & Eq.*) the question was, whether the bond embraced a new appointment to the office. Bartlett *v.* Att'y-General, was the case of a new deputation, new security given for the additional duty. Pyhus *v.* Gibbs (38 *Eng. L. & Eq.*) is the only case where the question presented for judgment in the present case was directly involved. In that, it was held that the sureties of a bailiff of a county court were discharged, on the ground that his powers had been enlarged, and his responsibilities increased. The court do not appear to have considered the point, whether there was not a well-grounded distinction between official bonds and contracts of private parties. There have been several cases in this country where it has been held that a subsequent change of the duties of an officer do not discharge his sureties. In White *v.* Fox (9 *Shepley, Maine*) it was held that a change in the duties of a clerk of the court did not discharge his sureties, the court saying, that the sureties were bound for the faithful discharge of the duties of the office—that is, for the faithful discharge of such duties as the laws for the time being should require to be performed by the clerks of judicial courts; and further, that there was but little similarity between such cases and those arising out of offices or trusts regulated by contracts. The People *v.* McHatton (2 *Gilman's Ill.*), it was held that a legislative extension of the time for paying over the taxes of three weeks, did not discharge the sureties of the officer. State *v.* Castelon (3 *Gill, Md.*) is a similar case. In Kindle *v.* State (7 *Black*, 5 *&* 6) a similar rule was applied, when the time for payment by a county treasurer was extended. In Coulter *v.* Morgan, adm. (12 *B. Monroe*, 278) it was held that sureties were bound, although the taxes were increased after the giving of the bond. In Mooney *v.* State (13 *Missouri*, 7) it was held that sureties of a sheriff were bound for the performance of new duties created after giving the bond. Bartlett *v.* Governor (2 *Bibb, Ky.*) a similar ruling was made. Other similar cases might be cited, but those already cited I think sufficient to show that a legislative alteration of the duties of an officer do not discharge his sureties, so long as the duties remain appropriate to the office.

My conclusion is, that the judgment should be reversed, and a new trial ordered; costs to abide event.

HUNT, J.—On the 15th day of January, in the year 1850, Mahlon Jackson was appointed one of the commissioners for the county of St. Lawrence, for loaning certain moneys belonging to the United States, deposited with the State of New York, for safe-keeping. The appointment was made in pursuance of the provisions of chapter 150 of the laws of 1837. (*Laws* 1837, p. 121.) The defendants became sureties for said Jackson in the bond executed by him, under the said act. The act required the bond to be in a penalty named, and to be conditioned "that if the above bounden (Jackson) shall well and faithfully perform the duties of said commissioner, pursuant to the act, entitled 'an act authorizing a loan of certain moneys, belonging to the United States, deposited with the State of New York for safe-keeping,' and shall discharge his said duties without favor, malice or partiality, then their obligation to be void, otherwise to remain in full force and virtue" (p. 126, § 20). The bond was executed in conformity with this statute. The statute provided for the distribution of certain moneys received by the State from the federal government, among the different counties of the State, according to their population, for the purpose of being loaned to the people of the said counties, in the manner therein specified. The duties of the commissioner, whose appointment was therein provided for, consisted, generally, in receiving the said moneys from the State, in loaning them upon bond and mortgage, collecting the interest thereon yearly, and the principal from time to time as it might become payable, re-investing the principal, and paying the interest to the State. The act contained much detail, but the substance of the duties of the commissioners is as I have stated. The commissioner (Jackson) and his colleagues received, under this act, the sum of about $80,000, in bonds and mortgages and cash. The State had also, in 1792 and in 1808, made certain loans to the people of the different counties, of its own moneys, and had appointed commissioners to attend to the same, whose duties were of the same general character as those appointed

under the act of 1837, referred to. In April, 1850, the State determined to close up the business of the commissioners under the loans of 1792 and 1808, and provided that it should thereafter be transacted by the commissioners appointed under the act of 1837. (*Laws* 1850, ch. 337, p. 732.) The fifth section of this act provided that the mortgages thus transferred should "form a part of the capital of the United States deposit fund, and the said commissioners for loaning certain moneys of the United States, shall exercise the same powers in relation to such mortgages, in the collection of principal and interest thereon, and in proceedings in case of default, and shall receive the same compensation therefor, as if said mortgages had been originally executed" under the act of 1837. Under this authority, securities or moneys to the amount of $500 were received by Jackson and colleague. Upon the termination of his office, in 1853, Jackson was in default in his accounts to the State, in the sum of $2,134 59. This action was brought to recover the same from the defendants, who were his sureties. It was proved that, of the default, $500 consisted of moneys received by virtue of the act of April, 1850, and the residue was of moneys received under the original authority. The judge trying the cause, and the general term of the fourth district, held that the passage of the act of 1850, and the transfer under it, vitiated and annulled the bond of the sureties of Jackson, and that no recovery of any part of the amount could be had against them. The correctness of their decision is the question now before us.

The defendants are sureties simply, and must respond according to their bond, nor more nor less. It cannot be enlarged or extended, nor are we called upon to diminish it. The position to which Jackson was appointed, was that of a public officer. He was appointed by the governor, with the concurrence of the senate. He was required to take the usual oath of office; and, in various sections of the act, the position is in terms designated as an office. The chief duty of his office was to receive and invest certain moneys intrusted to his care by the State. When the further sum of $500 was placed in his charge by virtue of the act of 1850, it was in all respects subject to the same regulations and to be disposed of in the

same way as the other moneys in his custody. No alteration was made in the nature, character, or duties of his office. An additional amount of duty, in every particular of the same nature as that already existing, was imposed upon the office (§ 5, *supra*). It was expressly enacted that the new securities should form a part of the capital of the United States deposit fund, and it was a portion of the original subject, so far as legislative power could make it such. In the language of the court in The Rochester City Bank *v.* Elwood (21 *N. Y. R.*, 92), this "was within the range of the *class* of duties that might properly be assigned" to such an officer. It was not like the case of Bonar *v.* McDonald (1 *Eng. L. & Eq. R.*, 1), where a clerk in a banking-house had been employed at a specific salary upon the agreement that he should embark in no kind of business or adventure, and the defendants having become sureties for the faithful discharge of his duties, the plaintiff increased his salary, upon his agreement to bear one-fourth of the losses to be incurred in the discounts obtained by him. The new agreement, it was held, created an entire change in the character of the business to be done by the principal, and was in direct violation of a part of the original understanding. It changed entirely the character of the responsibility of his sureties, and the court held them to be discharged altogether.

So in The N. W. Railway Company *v.* Whinody (10 *Exch. R.*, 77), the defendant became surety in a bond, which recited that A. B. had been appointed clerk to a coal company, at a yearly salary of £100, and conditioned for the faithful accounting for all moneys received by him for the use of the company. After a time the company substituted for the salary a commission of 6*d.* per ton for all the coal on which he should obtain orders. On a suit against the sureties, it was held that the condition was restrained by the recital, and the liability only continued while the clerk remained at the fixed salary The present case more nearly resembles that of Pybus *v.* Gibb (6 *Ellis & Bl.*, 903; 88 *Eng. C. L.*, 903), where a bond was executed by G., and two sureties, conditioned for indemnifying the high bailiff of the county court, against liabilities from the misconduct in his office of G., who was appointed one of the bailiffs. At the time the bond was executed the duties of the

office were regulated by 9 and 10 *Vic.*, *c.* 95, and after the execution of the bond the jurisdiction of the county court was extended and increased by five additional statutes. It was held that these statutes so materially altered the nature of the office, that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in a matter in respect to which the duty of the bailiff had not been altered by the subsequent acts. Among other alterations were those giving bankruptcy jurisdiction, authorizing the arrest of absconding debtors, and an increase of jurisdiction from cases under £20 to cases involving £50, and by consent to any amount, and an entire change in the fees the bailiff was authorized to demand. In deciding the case, Lord CAMPBELL, Ch. J., says: "It may be considered settled law, that where there is a bond of suretyship for an officer, and by the act of the parties or act of parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. * * * There being an increase in the jurisdiction of the court as to amount, a change in the nature of the court by giving bankruptcy jurisdiction, and jurisdiction over absconding debtors, and the table of fees being altered, I think that the office is essentially changed, and the sureties no longer liable." COLERIDGE, J., says: "When the nature of the employment of the principal is so altered by the act either of his employer or of the legislature, that the risk of the surety is materially altered, the surety has the right to say: 'I did not bargain for this, I am discharged.'" After reciting the facts, WIGHTMAN, J., says: "It appears to me, therefore, that in this case the effect of the increased jurisdiction was so to alter the court and the office of bailiff, as to affect the liability of the surety to his prejudice."

A case is cited in the opinion of the supreme court from Parker's Reports (Bartlett *v.* Attorney-General, *Park. R.*, 277), to the effect that a person who had become surety for a collector of the customs revenue, upon his appointment in 1691, was held not liable in respect of customs, which were first imposed in 1698. This doctrine would annul the bond of every canal collector in the State, or of every collector of customs, or of internal revenue in the United States, whenever the govern-

ment made any change in their rates or duties. If the imposition of duties on different subjects, or an alteration of rates, will produce this result, it is a waste of time and paper to execute such bonds. They are utterly worthless. But it is not certain that this is the rule of law. A public officer takes his office, with the obligation to perform all the duties incident to or connected with it then existing, or that may be added by the legislature, provided the nature and character of the duties remain the same. The obligation of his sureties is the same. The imposition of duties of the same nature and character, or the withdrawal of portions of them, pertain to the position. It is indispensable to the proper management of public affairs, and serious injury to the public interests would occur, were the rule otherwise. The obligation is for a faithful performance by the principal of all the duties of the office, during the term of his appointment, not of the duties as they exist at any particular moment. His duties vary with the requisitions of the statute, and whatever the statute imposes or withdraws becomes or ceases to be a part of his duty. The only limitation to this rule is that the duties imposed shall be of the same general nature and character. Many cases are cited from the Western Reports, establishing this precise principle, for which *see post*, and see also White *v.* Fox, 9 *Shepley* (*Maine*) *R.*, 341. The additional duty imposed upon Jackson and his associate commissioner, by the act of 1850, was plainly of the same nature and character as the duties belonging to the office when the sureties executed their bond. It was simply to receive, invest, and pay the interest on an additional amount, at the same time, in the same manner, and subject to the same regulations, as were prescribed in respect to the moneys already in their hands. The additional amount in the present case was $500.

The case of United States *v.* Kirkpatrick (9 *Wheaton R.*, 720), is in apparent conflict with these views. It is not cited by the respondent's counsel, or by the court below, and there may be some distinction between the cases which does not occur to me. I do not find that it has ever been recognized or affirmed. I cannot consider it sound, or practicable in the administration of the affairs of government.

If, however, this statute did alter the nature and duties of the office of commissioner, in the manner alleged by the respondent, so that the peril of the sureties was increased, did it operate to release them entirely, or only as to liabilities arising from such additional duties? The case of the sureties of an officer is not precisely the same as if their principal was a party to an ordinary civil contract. His position is rather that of an agent or servant of the government, than a contracting party. Certain duties were imposed upon commissioners by the laws in existence prior to 1850, when the sureties assumed their responsibility. A subsequent law, imposing additional duties, does not impair the prior laws, or the obligations under them. Herein the present case differs from the most of the authorities cited, which were cases of contract simply. The altered contract in those cases takes the place of, and entirely ends, the original contract; and if the party is not a surety upon the amended contract, he is so upon none, for none other is in existence. In the present case, the superadded duties have not affected the original duty. It remains in force, and the obligation for its performance is the same as if no new law had been passed. Why should not the obligation of the sureties for the original duty also continue? The case of Bonar *v.* McDonald (1 *Eng. Law & Eq.*, 1) was the case of a civil contract for the performance of the duties of a bank agency; and when the new contract was made, that the principal should bear one-fourth part of the losses, the original contract of employment was canceled. Not being parties to the new arrangement, there was, therefore, nothing to which the obligation of the sureties could attach. The N. W. Railway *v.* Whinney (10 *Exch. R.*, 77) was a private contract of the same character. Oswald *v.* Mayor of Berwick-on-Tweed (3 *Ell. & Bl.*, 652; 77 *Eng. C. L.*, 653)—and cited in various other places—is not an authority upon this point. The liability was held, on the ground that the change in the tenure of the office was provided for in the bond itself; and that the sureties could, therefore, take no exception to it. Pybus *v.* Gibb (6 *El. & Bl.*, 902; 88 *Eng. C. L.*) is more in point. It was, however, decided upon Bonar *v.* McDonald and Oswald *v.* Mayor of

Berwick, *supra;* also, upon the ground that the *duties of the office* had been essentially altered; and the distinction between a civil contract which is ended, and an obligation imposed by law, which still continues, is not adverted to. So, in Miller *v.* Stewart (9 *Wheaton*, 680) there was but one instrument of appointment; and when altered in an essential part, it ceased to be the obligation of the sureties, and all liability on their part ceased. The position I have stated is sustained by the following cases. In Coulter *v.* Morgan (12 *B. Monroe*, 278), and in Mooney *v.* The State (13 *Missouri*, 7), and in Bartlett *v.* Governor (2 *Bibb, Ky.*), and in Walker *v.* Chapman (22 *Ala.*, 116), and in Graham *v.* Washington County (9 *Dana*, 184), Governor *v.* Ridgway (2 *Ill. R.*, 14), Compher *v.* People (12 *Ill.*, 290), sureties were held to be liable in cases like the one now under discussion.

A new trial should be had.

All the judges concurred.
Judgment reversed.

GERREGANI *against* WHEELWRIGHT.

New York Common Pleas; Special Term, October, 1867.

SUPPLEMENTARY PROCEEDINGS.—ATTACHMENT.

To sustain an application for an attachment to punish a judgment debtor for disposing of moneys received by him *after* the service of an injunction order in supplementary proceedings, the creditor must show affirmatively that the money was already earned by or due to the debtor, when the order was served.

Application for an attachment.

This was a motion for an attachment to punish a judgment debtor for an alleged contempt in disposing of property in

violation of an order for his examination in proceedings supplementary to execution.

F. H. Bryan, for the motion.

W. G. Wheelwright, opposed.

VAN VORST, J.,—The order for the examination of the judgment debtor was made on March 11, 1867, and was served on him on the 16th of the same month. The order restrained the defendant from interfering with or disposing of his property. The proceedings show that the examination was commenced on the 28th day of May and continued, with various adjournments, until August.

In the course of his examination, on the 27th June, defendant said: "I had no money of any amount when this order was served on me; I have received money since, $624 99-100; I have spent it all."

The court is asked to punish the defendant for receiving and disposing of this money.

It is fair to presume from the proceeding that the sum was received as a portion of his salary as a clerk in bank. It was so claimed on the argument and not denied.

It does not appear that the money so received and disposed of was due to the judgment debtor at the time the order was served on him, or that it had been previously earned. On the other hand it is highly probable from the facts disclosed that it was subsequently earned. If so it could not be reached in this proceeding, and the defendant had a right to receive and dispose of it. (Browning *v.* Betts, 8 *Paige*, 568; Stewart *v.* Foster, 1 *Hilton*, 505.)

In any event, plaintiff, to succeed on this application for an attachment, should have shown *affirmatively* that the money was earned by or due to the defendant at the time of the service of the order for his examination. This he has not done (Potter *v.* Low, 16 *How.*, 549).

Motion denied without costs.

GARRISON *against* CARR.

New York Common Pleas; Special Term, October, 1867.

SUMMONS.—WAIVER OF DEFECT IN COMPLAINT.

It seems that in an action for unliquidated damages, although arising upon contract, the summons should be for relief and not for a sum certain.

Obtaining an extension of the time to answer a complaint, involves an admission that the complaint requires an answer, and is a waiver of an objection that the demand of relief contained in it does not conform to the notice in the summons.

Motion to set aside a complaint.

This action was brought by William M. Garrison against William H. Carr. After having obtained an extension of time to answer, but before answering, defendant moved to set aside the complaint as inconsistent with the summons.

D. Thornton, for the motion.

N. Tugwell, opposed.

VAN VORST, J.—The summons in this action is under subdivision 1, of section 129 of the Code, and demands judgment for a sum certain.

The complaint, it is true, discloses a cause of action "arising on contract," but not for the recovery of money only.

The amount sought to be recovered is not fixed or liquidated by the terms of the contract for a breach of the conditions of which this action is brought. Whether there are any damages, and their amount, are yet to be ascertained, and will require proof outside of the contract to establish them.

The summons must control, and as it indicates an action arising "on contract for the recovery of money only," the complaint, to be regular, should correspond with it. (Tuttle *v.* Smith, 14 *How. Pr.*, 395).

But I think that the defendant must be held to have accepted the complaint as it is, and to have waived the objection of its non-conformity to the summons. He has obtained an *extension of the time to answer*, and this should be held as an admission that the complaint was to be answered (Bowman *v.* Sheldon, 5 *Sand.*, 662). It is too late for him to raise that objection now. He should have moved promptly if he meant to have insisted on this irregularity, and not have sought the favor of an extension to answer, and use it for the purpose of this motion.

Motion denied; but without costs to either party.

TOMPKINS *against* IVES.

Court of Appeals; January, 1867.

OFFER TO ALLOW JUDGMENT.—COSTS.

The defendant served an offer, under section 385 of the Code of Procedure, to allow plaintiff to take judgment for a specified sum. The offer not being accepted, he served an answer setting up a counter-claim. On the trial the counter-claim was allowed, and the plaintiff recovered judgment for a sum less than the amount named in the offer. The aggregate, however, of the amount for which he recovered judgment, and the counter-claim extinguished by the judgment, exceeded the amount named in fhe offer.

Held, that the plaintiff was entitled to costs. The recovery was more favorable than the offer, inasmuch as it benefited the plaintiff by extinguishing the counter-claim, as well as by entitling him to the nominal sum awarded.

Appeal from a judgment and order of the Supreme Court.

This action was brought by Loren L. Tompkins against Titus Ives, to recover for services rendered, and for board and lodging furnished to the defendant.

Four days before interposing an answer to the complaint,

the defendant served an offer to allow judgment to be taken for $70, besides costs and disbursements. This offer was not accepted. The defendant then answered, setting up, among other things, counter-claims for goods sold and services rendered.

The cause was tried before a referee, who found, as conclusions of fact, that the demands of the plaintiff, established on the hearing before him, amounted to $336 40; that the amount of the defendant's payments and counter-claims was $268 61; and that the plaintiff was entitled to judgment for the balance, $67 79, with interest, amounting in all to $69 80, and for that amount judgment was entered. The counter-claims allowed by the referee embraced, among other things, the value of corn, butter and other articles sold by the defendant to the plaintiff, amounting to $37; so that if this allowance had not been made, the recovery would have largely exceeded the sum named in the offer.

On the entry of judgment, the clerk adjusted costs on the theory that the judgment recovered by the plaintiff, being for the sum of $69 80, was less favorable than the offer. The plaintiff applied to the special term for a retaxation of costs; and the court set the taxation aside, and ordered that full costs be allowed the plaintiff. From this order the defendant appealed to the general term, when it was affirmed. The object of the present appeal was to review the order of the general term.

The proceedings in the Supreme Court are reported, 30 *How. Pr.*, 13.

Brown & Beach, for appellants.

Moore & McCartin, for respondents.

PORTER, J.—The import and effect of the offer must be determined by the condition of the pleadings at the time it was made. It did not mean one thing then, and another four days afterward. The answer was not designed to vary the terms of the previous proposition, but to take issue on the plaintiff's demand, and to introduce cross-claims on the part of the defendant, for the purpose of reducing or defeating a

recovery, if no notice was given within the ten days allowed by law. The intermediate pleading was in its nature, provisional; and a notice of acceptance, whether served on the first or the tenth day, could apply only to the original offer. It would operate upon the plaintiff's claim, but not upon independent causes of action existing in favor of the defendant.

The litigation resulted in a recovery more favorable to the plaintiff than the offer. The nominal amount was less than the sum proposed; but, in determining the right to costs, the plaintiff is entitled to the benefit of the counter-claims, which the defendant afterward elected to interpose, and which are now extinguished by the judgment. (*Code*, § 385; Fieldings *v.* Mills, 2 *Bosw.*, 489; Ruggles *v.* Fogg, 7 *How. Pr.*, 324; Budd *v.* Jackson, 26 *Id.*, 401; Schneider *v.* Jacobie, 1 *Duer*, 694.)

The judgment should be affirmed.

BOCKES, J.—Without considering the objection urged, that the appeal is irregular, I am of the opinion that the order awarding costs to the plaintiff was properly granted. The facts bearing on this question are as follows: the defendant's attorney, before answering the complaint, served on the plaintiff's attorney an offer under section 385 of the Code of Procedure, consenting that he might take judgment in the action for $70, and costs. The offer was not accepted. An answer was served three days after the service of the offer, setting up payment, and also counter-claims amounting to $100 42. On the trial before the referee, the plaintiff recovered a trifle less than the sum offered.

When an offer for judgment is given, pursuant to section 385, the plaintiff has ten days within which to accept it; and the section provides, that, if the offer be not accepted, and "if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer."

The question now is, was the judgment recovered more favorable to the plaintiff than the offer? The plaintiff insists that it was more favorable, because, in addition to the recovery, counter-claims to the amount of $100 42 were extinguished.

The offer should be construed as an offer in the action at the time it was served, in its then condition. It had no reference to the case when changed in its condition by future proceedings. In effect, it was this: as the case now stands between us, I will allow you to take judgment for the sum offered. It meant this, and nothing more, when served; and its signification could not be enlarged from day to day afterward, without any intimation from the defendant of its more comprehensive import; and the section under which the offer was made evidently contemplates that it should take effect at the time of service, for it provides that, if the plaintiff fail to obtain a more favorable judgment, he must pay the defendant's costs from *the time of the offer*.

Giving effect to the offer, as of the time of its service, it is very obvious that the plaintiff obtained a more favorable judgment than he would by its acceptance, in this, that by the judgment, counter-claims to the amount, as set forth in the pleading, of $100 43 were extinguished. He was, therefore, entitled to recover the costs of the action, the same as if no offer had been served in the case.

All the judges concurred, except HUNT, J., who dissented.
Judgment and order affirmed.

STUYVESANT *against* BOWRAN.

New York Common Pleas; Special Term, October, 1867.

ARREST.—MOTION TO VACATE.—SUFFICIENCY OF EVIDENCE.

Where an order of arrest is founded upon the nature of the cause of action itself, and not upon extrinsic facts, the court will not, in general, vacate the order, upon affidavits denying the cause of action.

If this can be done in any case, it can only be where all doubt is removed, and the state of facts shown would warrant the judge in directing a nonsuit at the trial.

In an action for criminal conversation, the court will not vacate an order of arrest upon the ground that the guilty acts charged against the defendant are alleged to have been committed under circumstances rendering the charge highly improbable, and that they are denied by the defendant.

Motion to vacate an order of arrest or to reduce the amount of bail.

The facts are stated in the opinion.

George Shea, and *Edwin James*, for the motion.

Stephen Whitehorne, and *Alfred A. Phillips*, opposed.

VAN VORST, J.—The complaint in this action charges the defendant with having had carnal knowledge of the plaintiff's wife, and the action is brought to recover damages for the wrong, to the amount of twenty thousand dollars. The action was commenced in October, 1867. An order of arrest was obtained, and the defendant held to bail in the sum of $5,000, under which he is now arrested and held in custody. The order of arrest was obtained upon the complaint and two affidavits. One was made by the plaintiff himself, in which he alleges that the criminal intercourse of which he complains occurred at his own house in the year 1863, but that he did not discover it until about the month of May, 1867. The other affidavit was made by one Lawrence Sullivan, a lad now absent, seventeen years of age, who swears to having been a witness to the criminal intercourse at the time of its occurrence. He was then about thirteen years of age.

From the affidavits it appears that the plaintiff's knowledge of the offence was derived by him from the statements of Sullivan, and then only some four years after its commission. It appears that Sullivan was at the time an errand boy in the office of the plaintiff, and lived in plaintiff's house, but left plaintiff's employment in 1864, and lately and in May last made to the plaintiff the revelations contained in his affidavit, of the particulars of the guilt of the wife and the offence of the defendant. Defendant is a widower, brother-in-law of the plaintiff, having married plaintiff's sister, for some years past deceased. He was also a resident in plaintiff's house in 1863,

at the time he is alleged to have been guilty of the offence charged. The criminal conversation is alleged to have been committed so publicly as to have been witnessed by this boy; no efforts or precautions having apparently been used by the parties to conceal their crime. Why there was no earlier communication made by this witness to the husband of the offence is not stated, which is the more remarkable, if the boy's mind was impressed with the guilt of plaintiff's wife and defendant, as the plaintiff claims, in his affidavits, to have taken the lad into his office and house from considerations of kindness and mercy, and that the boy was forced to leave him on account of the cruel treatment of his wife.

In support of the motion to vacate the order, an affidavit was read, in which defendant denies most explicitly the allegations contained in the affidavits upon which the arrest was granted. Other matters appeared in the affidavits which are not important to be considered in the decision of this question.

The counsel for the defendant earnestly claim that there is not sufficient proof contained in the affidavits produced by plaintiff, of the commission of the offence by the defendant, and that the positive denial of the defendant should avail to overcome the effect of the affidavit of Sullivan. That the statements of Sullivan are so improbable that the defendant's denial, in connection with other circumstances, entitle him to be discharged from arrest, or in any event to have an order reducing the amount of bail.

Offences of the character charged in the complaint are always difficult to be established by complete and overwhelming proof; still there should always be such evidence adduced as to satisfy the court that the defendant is guilty. The evidence, while it points out the offence, should be credible. That the circumstances are improbable, however, is no answer to a sworn statement of an occurrence made by a person claiming to be an eye-witness, whose testimony is unimpeached. Many improbable things do actually occur in life, within the experience of all, and the force of testimony is not to be avoided by an argument based only on the seeming improbability of the statements, nor can much weight be given to a mere denial of

the charges, made by the defendant. If capable of committing this offence, and that, too, under the roof of the brother of his own deceased wife, he would be quite likely to deny it. But, in cases of this character, where the arrest is based upon the nature of the action itself, and not upon extrinsic circumstances, and is supported by affidavits, it is not the rule of this court to vacate the order upon affidavits introduced by the defendant denying that there is a cause of action, for that would be trying the merits of the action in advance upon *ex parte* affidavits. (Solomon *v.* Wass, 2 Hilt., 179.) There might be such a clear case made on a motion of this character as would justify a judge in vacating an order of arrest, although it was virtually a disposal of the merits of the action, but it would only be in a case removed from all doubt, and upon a state of facts which would justify the judge to non-suit at the trial. (Lewis *v.* Noble, 15 *Abb. Pr.*, 475; Barnett *v.* Gracie, 34 *Barb.*, 20.) The motion to vacate the order of arrest is therefore denied. Nor do I think the amount of bail should be reduced. The amount fixed is moderate in the light of the offence charged; it is not oppressive and there is no reason to believe that it is beyond the ability of the defendant to furnish.

Motion denied.

THE ARTIZANS' BANK *against* BACKUS.

Court of Appeals; January, 1867.

RIGHTS OF INDORSERS.—NOTICE OF PROTEST.

A notice of protest which contains enough to apprise the indorser that the bill or note has not been paid at maturity, and that it has been protested for non-payment, with a reasonable identification of the particular bill or note intended, is sufficient in form.

When a notice of protest bore no date, but contained the date of the note and the time it had to run, and was drawn in the present tense and served on the day of protest, and thus gave the indorser the means of knowing the day on which the protest was made, *Held*, that the omission to date the notice was not material, and did not defeat the right of action against the indorser.

A valid agreement between the holder and maker of a note, extending the maker's time for payment, and made without consent of the indorser, discharges him.

But such agreement is matter of defence which must be affirmatively proved by the indorser. If, upon the evidence, it is left doubtful whether such an agreement was in fact made, the jury are warranted in rejecting the defence.

Appeal from a judgment of the supreme court.

The facts involved in the case are stated in the opinion of Judge DAVIES.

DAVIES, Ch. J.—The defendant is sued as indorser of a promissory note, made by one J. R. Gilmore, payable at plaintiff's bank. The plaintiff had discounted a note for the same amount as the note in suit, made by the same parties, and which fell due November 7, 1857, and was protested for non-payment on that day. The president of the plaintiff applied to Gilmore, the maker, to take it up by a new note, and within six days thereafter, Gilmore went to the store of the defendant, and drew the note in suit, payable ninety days after date, to the order of the defendant, who then indorsed the same. When this note was produced in the trial, it appeared that originally it was dated "November 8, 1857," but that the figure "7" had been written over the figure "8," which was erased, making the note to read as dated, "November 7, 1857." The note was protested on the eighth day of February, 1858, and the notice of protest, to the defendant, described the note as dated November 7, 1857, correctly stating the amount thereof, and the name of the maker. It was admitted that the 8th day of November, 1857, fell on Sunday.

Upon the trial, the defendant testified that after the note was filled up and signed by Gilmore, and indorsed by him, it came directly into his hands from those of Gilmore, and did not go out of his hands until it went to the Artisans' Bank. That he took it to the bank and handed it to the president, Mr. Platt, and that he made no change in the note while it

was in his possession. That, on handing it to Mr. Platt, the defendant received from him the old note, which fell due November 7, and that this new note was made as a substitute for it. He also testified that at the time he indorsed this note, he did not at all notice the date of the note.

Gilmore testified that the original date of the note was November 8, 1857; that he did not alter the figure 8 to 7, as it appears in the note, and did not know who made the alteration; that he was present when the defendant indorsed the note, and that defendant took it from him to take to the bank. Gilmore was asked why the note was antedated, and he answered, the object was to date it the same date as of the maturity of the previous note; that he told defendant at the time he indorsed the note that it was in place of the other note, and that it was made at that time, and with that understanding; and that the only object he had, and the main point was, to get this note dated at the time the other fell due.

Tanner, a clerk in the bank, testified that this note came to the bank to replace another piece of paper, six days overdue; that he received it the same day it came into the bank, and then surrendered another security in place of it; and that he was entirely certain that the note bore date on the 7th, at the time he received it.

In this connection it is to be remembered that the defendant had testified that he took this note to the bank, and delivered it to Platt, the president, and at the same time received from him the old note. It conclusively appeared by the testimony of witnesses, that the substitution of the figure 7 for that of 8 was not in Mr. Platt's handwriting, and two witnesses acquainted with Gilmore's handwriting, testified unequivocally that the figure 7 was Gilmore's writing. It was not alleged, or pretended, that Gilmore had ever seen the note, or had it in his possession, except at the time it was indorsed by the defendant, and before it was taken to the bank by the defendant; and if, therefore, the testimony of these two witnesses is to be credited, that the figure 7 was in Gilmore's handwriting, it follows conclusively that such alteration was made either before or at the time the defendant indorsed the note, and it was certainly made before it was delivered by the defendant to the

bank. The jury were therefore warranted in finding November 7 was the true date of the note before it was delivered by the defendant to the bank. Whether they were or were not, such is the verdict, and it is not the province of this court to examine the testimony to see if it is sustained by it. Then we assume that fact as established, and it follows that the note was protested on the day it fell due.

The next question is, whether the defendant was duly charged as indorsee upon the dishonor of the note. Assuming, as we must, that the true date of the note was November 7, 1857, it fell due on the 8th of February, 1858, and on that day it was duly protested. The notary certified, and his certificate under the circumstances was *prima facie* evidence of the facts therein stated, that, on the 8th day of February, 1858, he duly served upon the defendant notice of the presentment for payment, and non-payment, and protest of the said promissory note. The defendant then proved that the following is the notice of protest which he received:

"*New York*, 18—.

Please to take notice that a promissory note, made by J. R. Gilmore, for $5,125 70, dated November 7, 1857, payable at the Artizans' Bank in ninety days, indorsed by you, is protested for non-payment, and that the holders look to you for the payment thereof," signed by the same notary who had protested the note and given the certificate already adverted to.

It is to be observed, that the defendant does not contradict the statement of the notary that the notice was served upon him on the 8th day of February, 1858; but it is now contended, on the part of the defendant, that the notice of protest was not sufficient to charge the defendant as indorser; that the notice must show that the presentment was made at the proper time; and that this notice is defective in that it has no date, and does not state the day of protest.

Bearing in mind that the main object of the notice is "to enable the indorser to take measures for his own security" (*Edw. on Bills*, 289), can it be doubted that this notice informed this defendant with reasonable certainty that this particular note had been dishonored? The note was accurately and cor-

rectly described in the notice as a note made by J. R. Gilmore, for the correct amount, with the correct date thereof, and payable at the Artisans' Bank in ninety days, and indorsed by defendant, and declares that the same "is protested." There is no pretence that there was any other note of this description in existence at the time of the protest, and the proof is undeniable that it was protested on the day it fell due. If it was important for the defendant to know from the notice the day of protest, he had all the elements in the notice to ascertain that fact. The correct date of the note was given, and the time it had to run, namely, ninety days. He therefore saw at a glance that it fell due on the 8th of February, 1858, and on that day this notice was served upon him, correctly describing the note, stating that the same "is protested," and that the holders looked to him for the payment thereof. The notice speaks in the present tense, of the protest as having been made on the day the notice was given, and not as of a past transaction, as that the note was or had been protested. If the notary had verbally, on the 8th of February, stated personally all that is contained in this notice to the defendant, can any serious question be raised that the defendant would not have been duly notified of the dishonor of this particular note? He was bound to assume that the notary would not—as he did not, in fact—protest the note before it arrived at maturity, and the notice served on him shewed that the note matured the very day of the service of notice of protest. There is no pretence that there was any other note of Gilmore's in existence, indorsed by this defendant, than the one in suit, and the date of the service of the notice of dishonor informed the defendant that it was not protested on any day after its maturity. As a matter of fact, it was protested on the day it matured, and there was nothing in the notice at all calculated to mislead the defendant. The essential facts needful to be communicated to the indorser, to bind him, were: 1. That the note had not been paid at maturity. 2. That it had been protested for non-payment. 3. An identification of the note thus unpaid and protested. All that information was conveyed to this defendant, with reasonable certainty, by the notice which was served upon him on the 8th of February, 1858.

A brief reference to a few authorities will show that all has been done to charge this defendant which the law requires. Cook *v.* Litchfield (5 *Seld.*, 279), is relied upon as showing the insufficiency of the notice in this case. An examination of the facts there presented will show that it is an authority for the contrary doctrine. Four notes were issued by one J. L. Carew, payable to the order of the defendant, and indorsed by him. They all bore the same date, for equal amounts, and only differed in being payable at nine, ten, eleven, and twelve months from date. When the first note became due, it was protested, and notice given to the indorser in these words: "Please to take notice that a promissory note made by J. L. Carew for $740, with interest, dated April 2, 1849, indorsed by you, was, on the day the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof." It is to be observed that the important fact as to the time the note had to run—essential in that case to its identification—was omitted in that notice, but accurately stated in the notice in this instance. The plaintiff was the owner and holder of the four notes. RUGGLES, Ch. J., in the opinion of the court, says: "In determining whether the description of the note or bill is sufficient, the circumstances of the case, and the defendant's knowledge of those circumstances, be taken into consideration; and, therefore, where the notice to the drawer of a bill of exchange was, that his draft on A. B. was dishonored, the notice was adjudged to be sufficient, until it was shown that there was another bill drawn by the defendant on A. B., for which the one in question might be mistaken" (citing 7 *Mees & W.*, 473). But the notices for the three notes last falling due were adjudged insufficient, as they contained no specification of the note referred to in the notice of the protest. In reference to these cases Judge RUGGLES said: "Nor does the notice in either case state when the protest mentioned in it was made, except by reference to the time when the note became due, and that time is not specified." The notice was held sufficient to charge the indorser on the note first falling due.

In the case at bar, there was only one note in existence made by Gilmore, and indorsed by the defendant. The amount

of that note is accurately stated in the notice, by whom made, and by whom indorsed, its date, when payable, the time it had to run, which showed the time it became due, and declaring that the same "is protested," thus refering to an act done simultaneously with the giving the notice. Cayuga Bank *v.* Warden 1 (*Coms.*, 413), is an authority to sustain the sufficiency of the notice. It was there held, that whether the demand of payment was duly and regularly made, was matter of evidence to be given at the trial, citing Stochen *v.* Collins (19 *Carr & P.*, 653); Young *v.* Lee (2 *Kern.*, 551), is a case in point. There the notice was in these words: "Sir, please to take notice that a promissory note, drawn by Bell and Goodman, for $1,000, indorsed by you, is protested for non-payment, and that the holders look to you for payment thereof." The notice was dated on the day the note fell due, but there is no indication in the notice of that fact, or when the demand was made; neither was the date of the note given in the notice, with the time it had to run, thus showing the date of its maturity, or the place where payable, as in the notice now under consideration. Yet this court held the notice sufficient to charge the indorser. Judge JOHNSON, in the opinion of the court, says, that the statement in the notice in that case, dated on the day when the note was payable, must be intended to mean that it had been demanded, and payment refused, upon the day when it became due. A statement that a note had been protested on the day it became due, though the day was not stated, nor could be collected from the terms of the notice, was held to be sufficient in Litchfield *v.* Cook (*MS., Dec.*, 1853), in this court.

In Home Ins. Co. *v.* Green (19 *N. Y.*, 518), DENIO, J., correctly observed, that it was true that no precise form is necessary for these notices; but they must reasonably apprise the party of the particular paper upon which he is sought to be charged. In that case, the name of the maker of the note was left blank, and it was held that the notice did not satisfy that requirement. The facts in Hodge *v.* Shuler (22 *N. Y.*, 114) were these: The defendants were sought to be charged as indorsers of a promissory note issued by a railroad company, signed by Sam. Henshaw, treasurer, and F. Follett,

president, for the sum of $1,000, payable to the order of the defendants. The note bore date April 1, 1850. It appeared that the defendants were contractors in building the road for said company; and that, on or about the date of said note, they received from said company, in satisfaction of their contract and work, the note in suit, and four other notes of the same date, and amounts in every respect corresponding with the note in suit, except that the numbers of all the said notes marked thereon were different each from the other. The notice of protest served on the defendants, omitting the date thereof, was in these words: "Please take notice that a promissory note made by S. Henshaw, treasurer, for $1,000, dated April 1st, 1850, payable in four years, in favor of yourselves, and indorsed by you, has been presented by me to the office of the treasurer; and payment being duly demanded was refused, whereupon, by direction of the holder, the same has been protested, and payment thereof is requested of you." The law applicable to notices of this character is thus clearly stated by Judge WRIGHT: "A notice that, in terms, or by necessary implication, or reasonable intendment, informs the indorser that the note has become due, and has been presented to the maker and payment refused, is sufficient. The party to whom the notice is addressed should not be misled by an indefinite or uncertain description of the note, and, from the imperfection of the notice itself, be unable to determine to what particular note it refers. A notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only when it fails to give that particular information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored note, he will be charged. A note is well described when its maker, payee, date, amount, and time and place of payment are stated." As already observed, all these essential particulars are contained in the notice given in the present instance.

The same doctrine is enunciated by the Supreme Court

of the United States, in Mills *v.* Bank of the United States (11 *Wheat.*, 431), and re-affirmed in this court in the two cases of the Bank of Cooperstown *v.* Woods (28 *N. Y.*, 545–561). Upon principle and authority, therefore, we are bound to hold the notice sufficient in this case to charge the indorser; and the omission to date it was an immaterial circumstance. That omission, in this instance, could not, and did not mislead the defendant in the identification of the note protested.

There remains to be considered one other question, viz.: Whether the plaintiff gave time to the maker of the note, whereby the indorser was discharged. Upon this point, the judge charged the jury as follows: "If you come to the conclusion that there ever was a valid and subsisting agreement between Gilmore and the bank, or Platt, to extend the time of payment, and to give these securities, and that the bank accepted them, then you will have to find for the defendant, because the result of it is, that it would extend the time of payment to Gilmore upon the promissory note upon which this action is brought for a year, or for whatever time was agreed upon. Such extension, if made, was without the consent of Backus, the indorser, and it will render his engagement, which is that of a surety, invalid. But, on the other hand, if you come to the conclusion that Gilmore's testimony is not reliable, and that there never was a valid and subsisting agreement, and no agreement was made, and these mortgages were not valid securities in the hands of the bank, then the defence founded on the extension of time to Gilmore fails."

The defendant, in his answer, alleged that the plaintiff, for a valuable consideration, after the maturity of said note, and without the knowledge or assent of the defendant, made an agreement with Gilmore, the maker of the note, whereby plaintiff agreed to extend the time for the payment of said note for the period of one year, from the date of said agreement. He also set up, that, after the maturity of the note, the plaintiff took from Gilmore a certain mortgage on lands in New Jersey, "as collateral security for his entire indebtedness to the plaintiff," but upon the understanding and agreemen

that the same should be applied, first, to the satisfaction of so much of said indebtedness as was secured by the said promissory note. "That said mortgage was a lien upon property of great value, and that subsequently the plaintiff discharged the same of record, and the same was surrendered and delivered up to Gilmore. The substance of this allegation is, that the plaintiff took the mortgage as collateral security, and subsequently canceled it. There is no claim that the plaintiff ever collected or received any thing on account thereof, or that, by the exercise of true diligence, he might have obtained any thing thereon. There is no averment that the mortgage was of any value. It might well be a lien on property of great value. Yet, if it was not a primary lien, or if it did not appear that the prior liens were less than the value of the property covered by them, it would not follow that the plaintiff surrendered security of any value by the discharge of this mortgage.

From the facts set up in the answer, it did not appear that the defendant had been in any way damnified by the dealings of the plaintiff with Gilmore in respect to this mortgage.

As to the extension of time, Gilmore, upon the trial, testified that after the note became due there was an agreement between himself and plaintiff's president. He says it was an extension of the whole indebtedness for one year, with the privilege of two, if it was required, to carry out certain operations he (Gilmore) had projected. He was to give the bank security on a considerable amount of property in New Jersey, and the bank was to loan him $10,000 on the property, he applying this $10,000 to the improvement of the property. To carry out this arrangement, Gilmore, with his wife, executed to the bank two mortgages, which he placed in the hands of the attorney of the bank. He further testified, that he never received the $10,000, or any part of it, and that the plaintiff failed to carry out his part of the arrangement.

It appeared, on the part of the plaintiff, that an agreement was drawn up to be executed between the plaintiff and Gilmore, but that it never was signed. The agreement for

the extension of time to Gilmore, for the payment of the note, depended wholly upon Gilmore's testimony; and the judge at the circuit very properly told the jury, that if Gilmore's testimony was to be believed, and they found that a valid and subsisting agreement had been made between the plaintiff and Gilmore, extending the time of payment of the note, without the consent of Backus, then Backus, standing as surety for the payment of this note, was discharged. But, on the other hand, if the jury came to the conclusion that Gilmore's testimony was not reliable, and that no valid subsisting agreement was ever made, then the defence, founded on the extension of time to Gilmore, failed. The charge of the judge to the jury is in harmony with the doctrine laid down by this court in Halliday *v.* Hart (30 *N. Y. R.*, 474) and upon the facts as found by the jury in the present case, that authority is decisive of this case.

It was vital, to the establishment of the agreement to give time, that Gilmore's statement to that effect should be believed. There was no foundation for the existence of this agreement, but his testimony. Martin, a witness for the defendant, expressly negatives the idea that any agreement for extension of the time for the payment of this note was ever made with Gilmore. He states, that Gilmore proposed an extension of his indebtedness for twelve months, and that he would give security; and there were other terms, among which was one that the bank should advance to Gilmore $10,000 or $20,000. It is apparent, from the testimony of both witnesses, that this negotiation fell through. By the terms of the mortgage, no extension of time for the payment of Gilmore's indebtedness, which was secured by it (and it professed to secure the whole), was given, or provided for, or mentioned. It contemplated and declared that the whole amount, thus secured, was due presently and immediately demandable, and negatives the idea or statement of Gilmore that twelve months was given to him for the payment of his indebtedness to the bank.

It is difficult to believe, that if the bank had agreed to give Gilmore one or two years for the payment of his indebtedness to it, and such time was given in consideration of his securing the same by a mortgage, such mortgage should not only have

been silent as to such time, but, in express terms, should have made the amount secured thereby immediately payable.

To establish this defence, as set up and claimed by the answer, it was essential to make out the existence of the agreement relied on. That was a question of fact, which was properly left to the jury. They have found it adverse to the claim of the defendant's answer, and this court is to assume that no such agreement was ever made as therein set forth.

This disposes of this ground of defence, and the judgment appealed from must, therefore, be affirmed, with costs.

GROVER, J.—It is well settled, that an error in denying a non-suit, at the close of the plaintiff's case, for a defect of proof, cured, if such proof is supplied at a subsequent stage of the trial. This renders it unnecessary to determine whether the plaintiff was bound, in the first instance, to give any evidence as to the alteration of the date of the note apparent on its face. Evidence upon this point was subsequently given by both parties, and the question properly submitted to the jury. The only legal question arising upon the extension given by the plaintiff to Gilmore, the maker of the note, for payment, was whether the judge should have directed a verdict for the defendant, or submit the question of Gilmore's credibility to the jury. I think the submission of the latter question to the jury not error. It is the duty of the court to direct a verdict in accordance with the evidence, in cases where there is no reasonable doubt about the facts, and to assume that the testimony of a witness is correct, where there is no apparent reason to doubt its truth. But when such doubt exists, founded either upon the improbability of the testimony, the manner of the witness, or the inconsistency of the testimony with other facts appearing in the case, the question should be submitted to the jury. In the present case, Gilmore testified that one of the provisions of the agreement, by which it was claimed the time was extended, was, that the bank should loan him the further sum of $10,000. This had never been done; and, although years had elapsed, it did not appear that any portion of the money

had been called for, nor was any explanation why it had not been attempted. It also appeared that the bank had canceled of record one of the mortgages given, as was claimed, pursuant to the agreement, without receiving any pay or further security upon the large debt owing it by Gilmore. The president of the bank, with whom it was claimed the agreement was made, was dead. This, I think, together, presented a proper case to submit the credibility of Gilmore's testimony to the jury.

Whether the jury came to the proper conclusion thereon, is a question for the consideration of the Supreme Court, but not for this court. Indeed, the Supreme Court, at general term, upon appeal from the judgment, has no power to set aside a verdict on the ground that it is against the weight of evidence. That can only be done upon an appeal from an order of special term granting or denying a new trial.

The only remaining question is whether the notice of dishonor of the note served upon the defendant was sufficient. The defect claimed is that it did not inform the defendant that the note was presented at maturity, or when it was presented for payment, and dishonored. The notice is without date, properly describes the note and says it is protested. The certificate of the notary shows presentment and dishonor on the day the note matured, and that this notice was on the same day mailed, post-paid at the proper place, addressed to the defendant.

As an original question I should hold this notice insufficient. From it the defendant could not tell whether the note was presented at the proper time or not. Wynn *v.* Alden (4 *Denio*, 163), holds such a notice insufficient for the reason above assigned.

But I am unable to distinguish this case from Young *v.* Lee (2 *Kern.*, 552), determined by this court. The notice in that case in respect to the point under consideration was precisely like the one in the present case, except that it was dated upon the day of the maturity of the note. It is a settled rule that in considering the sufficiency of a notice, any extrinsic fact known to the defendant which would inform him fully in respect of any fact in which the notice was defective must be taken into account, and the point determined whether the notice, aided by such fact, gave the necessary information. (See

case last cited.) The court may, I think, take judicial notice of the manner of mailing letters; that is, that the date of mailing is uniformly stamped thereon. Then all the defendant had to do was to look at the time of mailing the notice, and he would see that it was upon the day the note matured. This proved that the note was protested that day, as clearly as though the notice bore date upon that day. If, therefore, the date of the notice in Young *v.* Lee informed the defendant that the note was protested on that day, and not before, it would follow that the date of the mailing the letter conveyed the same information.

It is important that a rule established by this court should be adhered to in all cases coming within the same principle. My conclusion is that upon this authority the judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

MARKHAM *against* JAUDON.

Supreme Court, First District; General Term, October, 1867.

RIGHTS OF BROKERS.—NOTICE OF SALE OF PLEDGE.—NEW TRIAL.

When a stockbroker purchases stock for a customer, on an understanding that the customer is to keep up a certain margin, and that, while it is kept good, the broker will hold the stock for him, the customer does not, in the absence of an agreement to that effect, acquire a right to notice before the stock can be sold for a failure on his part to keep good the margin.

The relation of pledgor and pledgee, and the implied right of a pledgor to notice of time and place of sale of the pledge, do not arise in such a case.

On appeal from an order refusing a new trial applied for upon a case, as well as upon exceptions, if it appears that an expression of opinion upon a question of facts, by the judge in his charge to the jury, probably misled them, to the appellant's injury, a new trial will be granted.

Appeal from a judgment upon a verdict, and order denying a motion for a new trial.

This action was brought by George W. Markham against William B. Jaudon, a broker, to recover damages for an alleged unlawful sale of shares of railroad stock which had been bought by the defendant upon orders given by the plaintiff.

The case was tried at the circuit before Hon. H. A. FOSTER and a jury. The evidence on the trial showed the stock to have been bought on a ten per cent. margin; that the decline in the market absorbed the margin; that the plaintiff failed to increase it; that the defendants sold the stock at a loss; that the market subsequently reacted thirty per cent. The only conflict arose as to the terms of the contract, and as to the notice of a demand for more margin.

The justice upon the trial ruled—

1. That the stock was a pledge, and plaintiff was entitled to notice of time and place of sale.

2. That in case such notice was not given, the plaintiff was entitled to damages equal to the highest market price the stock reached up to trial.

3. That evidence of custom was inadmissible.

The defendant excepted to these rulings. The jury having found a verdict for plaintiff, and a motion for a new trial having been denied, defendant now appealed.

H. S. Bennett, for the appellant.

James Emott, for the respondent.

*By the Court.**—LEONARD, J.—The judge held at the circuit substantially that the relation of a debtor and creditor existed between the broker and his customer, and also that of pledger and pledgee, when a stockbroker purchases shares for his customer upon a margin furnished by him, and agrees to hold or carry the shares so purchased, in case a margin of ten per cent. is kept good. The judge also held that the broker could not sell the shares so purchased without notice of the time and

* Present—LEONARD, CLERKE and WELLES, JJ.

place of such sale, upon a failure of the customer or purchaser to comply with his contract, in keeping his margin good.

The evidence as to some portions of the contract between the plaintiff and the defendants was contradictory; but there was no dispute that the plaintiff was to keep a margin of ten per cent. on the par value above the market rate of the shares in the hands of the defendants; that he failed to do so; that the defendants duly notified him of the fall in the market price of the shares, and that they required him to furnish more money to make his margin good, and that the plaintiff having neglected to do so, the defendants sold out the shares at the Stock Exchange without further notice to plaintiff.

There was a clear breach of his contract on the part of the plaintiff, and unless the obligation imposed by law upon a pledgee to notify a pledgor of the time and place of the sale of the thing pledged devolves upon the defendants under such circumstances, upon such a contract, they had the right to sell the shares in the manner they did, and the plaintiff has no cause of action.

The effect of the contract is, that the broker, upon the performance of certain conditions by the customer, will buy and sell a certain number of shares; and in case any advance accrues, and is secured by a sale made under the direction or authority of the customer, he shall enjoy the benefit of it; and in case a loss ensues, the broker having performed the contract on his part, the customer shall bear it.

It does not appear that, in the present case, the shares were to be carried for any certain or named period of time. The plaintiff, no doubt, could have terminated the transaction at any time, even in case no agreement as to time existed, by directing a sale of the shares, or by paying the cash, with interest and commissions.

The defendants could not do so where there was no stipulation as to time, except, perhaps, on sufficient notice to the customer while his margin was good, or upon failure to keep the agreed margin fully supplied.

The broker lends no money to his customer, and gets no security from him except as to the contingent liability which may arise from a fall in the market price of the shares. The

shares purchased are the primary source for the payment of the money advanced by the broker, in case the customer does not desire to pay for them and take them into his own possession, or neglects to perform the agreement with his broker. The "margin" is the security against loss on the part of the agent. The margin, instead of being paid in money, may be secured by a pledge of property, and such security would then be subject to the rules of law governing pledges.

Suppose the broker purchased one hundred shares on the order of his customer for cash, but, upon being called upon after the purchase of the shares, the customer should neglect or be unable to pay for them. There could be no pretence of the existence of a pledge, or that the broker must give notice of the time or place of the sale of the shares so purchased. The broker might realize his money by an immediate sale for the account of the principal, on the most summary notice of his intention to do so, or even without any notice. This course is justified by the breach of the implied promise of the purchaser to pay cash as soon as the purchase should be made. The principal would be liable for the loss, if any arose; or, if any profit accrued, he would be entitled to receive it; the broker having trusted him in making the transaction, without the cash in hand. It can make no difference in the relation or liability of the parties, if the broker should hold the shares, and forbear for a time to close the transaction by a sale. The broker does not become a pledgee, and his customer a pledgor, of the shares, in consequence of the postponement. Nor am I able to perceive that the relation or liability of the parties would be varied, in this respect, if the postponement should take place under an agreement between the broker and his customer for that purpose, as in the present case. In either case, the right to sell arises from a breach in the customer's contract; in the one case for failing to supply the margin agreed on, and in the other from the non-payment of the price. The nature of the transaction also requires, in many instances, the right to make a prompt sale to prevent loss.

Under a contract like the one proven, the customer does

not become the owner of the shares upon their purchase by the broker. He may become the owner, if he pays for them; but under the contract his interest exists only in the margin, which, by the enhanced value of the shares, may be largely increased, or, by a decline, may be wholly extinguished, and a further loss ensue.

The transaction bears more resemblance to a conditional sale of property, which will belong to the purchaser on the fulfillment of his contract; but, upon his breach, he will lose not only his right to obtain the property, but also such sum as he has paid; depending, in this particular, upon the terms of the contract.

I concur entirely with the observation of Judge INGRAHAM in the case of Hanks *v.* Drake and others, wherein, upon a similar state of facts, he remarks: "Under such an agreement, the defendants had a right, upon the plaintiff's failing to deposit a further margin when required so to do, to sell the stock and close the transaction. This right to sell arises from the previous violation of the contract, on the part of the person for whom the stock was purchased, and who, by neglecting to perform on his part, terminated the obligation of the defendants to hold the stock any longer, and left them at liberty to sell the stock for their own protection. The notice which he requires in the case of a sale of a pledge of stock as security for the payment of a sum of money advanced thereon, is not required in such a case." This must be the law of our general term until overruled by higher authority.

I do not say that the notice in this case was sufficient or otherwise. That question was wholly disregarded by the judge at the trial. He was asked to charge "that the plaintiff was at the risk to inform himself of the state of the market." The judge said: "He was bound to inform himself of the state of the market; no doubt about that, and it was his duty to keep this margin good; but the moment he failed as pledgor he had a right to notice before he could be sold out, unless there was an express agreement."

He was afterward asked to call the attention of the jury to the fact of the plaintiff having an office. The judge replied: "There is no pretence of any notice of the time and place of

the sale of the stock." Counsel then inquired: "Does your honor hold that to be necessary?" And the judge replied: "I have so held." Thus the verdict was called for by the charge, as if it turned wholly upon the notice required in the case of a pledge.

The jury were misled by this position, and no fact in dispute was before them for consideration, although a lengthy charge had been delivered. They might as well have been instructed to find for the plaintiff, for there was no evidence of any notice of the time or place of the sale, and the case was made to turn upon the omission.

There is also another branch of this case deserving of atten tion.

The appeal is from an order refusing a new trial upon the merits, as well as upon the law arising upon exceptions.

The defendants testified to an express agreement that the stock purchased by the defendants might be sold if the margin was not kept good, without any notice of the time or place of sale, or any notice of any kind.

The judge argued to the jury in strong terms that such an agreement was wholly improbable, while to those who are acquainted with the transactions customary among stock brokers in the city of New York, it is pretty well understood that any argument drawn from the improbability of the existence of such an agreement would be wholly unfounded.

The defendants sustained, in my opinion, an injury before the jury by the unauthorized expression of the personal views of the judge.

On both grounds there should be a new trial, with costs to abide the event.

CLERKE, J., concurred.

WELLES, J., dissented.

HOWARD *against* FREEMAN.

New York Superior Court; General Term, October, 1867.

TRIAL.—RIGHT TO A POSTPONEMENT.

Under the law of this State, as it stood prior to the Constitution of 1846, a decision of a judge at circuit, refusing an application for a postponement of the trial of a cause made upon the ground of absence of a material witness, was regarded as so far affecting a substantial right as to be subject to review, and, if erroneous, to reversal.

There is nothing in the legislation upon procedure, passed under the Constitution of 1846, to change this rule. The power of a judge presiding at the trial of a common-law action, to grant or refuse a postponement, must still be exercised according to law; and his decision continues to be subject to review.

The former practice of the Court of Chancery, in respect to granting extensions of time in which to take the testimony of witnesses,—stated.

Under the union of legal and equitable forms of action, which has been introduced by the Code of Procedure, the grounds upon which a party may claim a postponement of a trial for the absence of a material witness, are the same in actions for equitable relief, as in those for relief of a legal character. In both classes of cases, a party has the right, when a cause is called for trial, to move for a postponement; and, as a concomitant to this right, he is further entitled to a review of a decision denying his motion.

Whether a cause is of legal or equitable cognizance,—whether it was tried before a judge and jury, or before the court alone, a party may entitle himself to a review of a decision denying his motion to postpone for the absence of a material witness, in either one of these modes:

1. On the denial of his motion he may withdraw from the trial; and if it proceeds, and the cause is decided against him, he may, upon affidavits showing the application to postpone, the papers upon which it was founded, its denial, and that a decision has been made against him, make a non-enumerated motion at special term to set aside such decision.

2. Or he may remain and try the cause on the merits; and, in case of a decision against him, he may, then, either pursue the course above stated to obtain a new trial, or, if the trial was by jury, he may move at special term, upon a case, for a new trial, alleging, as one of the grounds of error, the refusal to postpone; or, if the trial was by the court, he may appeal direct to the general term, alleging the refusal to postpone as cause for reversal.

The authority of the general term, upon appeals from the special term, is not confined to a simple reversal or affirmance; but it may make such order as the special term should have made in the first instance.

Appeal from an order at special term.

This action was brought by Joseph Howard against John W. Freeman, and others. It now came up upon an appeal from an order at special term, denying a motion made by the defendants to set aside a default and inquest which had been taken against them at special term.

At the trial term five different applications to put off the trial of the cause were made.

The first of these applications was on June 5th, and the direction made by the judge on that was made June 6th. By this direction the cause was set down for trial for June 13th.

The second application was on the 6th or 7th of June, and resulted in its denial, and an affirmance of the previous direction setting the cause down for the 13th.

These two applications were founded on an order for a commission, made on the 10th of April, 1866, upon plaintiff's application; an order amending the order of April 10th, made, apparently, from its caption, on the 9th of April, but evidently not before the 23d April; an affidavit of defendant Freeman, sworn June 6th; an affidavit of Joseph Larocque, sworn June 5th; a notice from defendants' attorney; the interrogatories and cross-interrogatories to be annexed to the commission; and the pleadings in the action; and were opposed by an affidavit of plaintiff's attorney.

The third application was on the 14th of June, and resulted in the cause being set down for the 21st for trial. This was founded on an affidavit of defendant Hedden, sworn to June 12th; an affidavit of defendant Freeman, sworn to June 13th; a certificate of Dr. Breck, and his affidavit, sworn June 12th; and was opposed on an affidavit of plaintiff's attorney, sworn to June 12th, 1866, and a stipulation made by him June 14th.

The fourth application was made on the 20th June, and resulted in the cause being set down for the 26th of June. It

was founded on all the papers used by plaintiff on the previous application and on an affidavit made by defendant Freeman, sworn to June 20th, 1866, and an affidavit of Dr. Breck, sworn to June 19th, 1866; and was opposed on the papers used on behalf of plaintiff on the previous application.

The last application was made June 28th, and resulted in an inquest being taken against defendants, and the making and filing of findings of fact and law by the judge before whom the inquest was taken. This was founded on an affidavit of defendant Freeman, dated June 27, and an affidavit of Dr. Quackenboss, dated June 25, and on all the papers used on behalf of defendants on the previous applications; and was opposed on all the papers used on behalf of plaintiff on the previous applications.

The taking of the inquest was commenced June 28th, and finished June 29th.

On the 8th of August the judge made and filed his findings of fact and law, and a judgment order.

The June special term was extended to the third Monday of December.

On the 14th of August defendants obtained an order requiring plaintiff to show cause on the 21st of August why the default and inquest should not be opened and vacated, and the said findings and judgment order, and all proceedings had thereon, vacated and set aside, and why the defendants should not have a new trial, and the proceedings be stayed until October term to enable them to procure the execution and return of the commission ordered on plaintiff's motion, and why such further and other order should not be made as might be proper.

This order to show cause was founded on an affidavit of Jeremiah Larocque, one of the defendant's attorneys, sworn to August 14, 1866; two affidavits of defendant Freeman, sworn to July 6th, 1866; another affidavit of Jeremiah Larocque, sworn to July 6; an affidavit of Joseph Larocque, another of defendant's attorneys, sworn to July 6, which had attached to it the various papers on which the several applications to postpone were made, and the so called orders made thereon, with a copy of the stenographer's minutes.

This motion, it appears, was adjourned to October 16.

On the 12th of October another order was procured requiring plaintiff to show cause why the default and inquest and subsequent proceedings should not be set aside, on the 16th instant, to which time defendant's motion then stood adjourned; upon sundry affidavits annexed in addition to those on which the order of August 14th was founded.

The affidavits annexed were one of defendant Hedden, sworn to October 11; one of Jeremiah Larocque, sworn October 11; one of Joseph Larocque, sworn October 10; one of G. R. J. Bowdoin, sworn October 12; and one of one Arthur, sworn October 11.

On the 1st of October defendants gave plaintiff notice that on the hearing of the motion under the order of August 14, it would be moved, in addition to the grounds specified in that order, that the inquest, findings of fact and law, and interlocutory judgment be set aside for irregularity and a mis-trial in that the findings did not dispose of all the issues; that the judgment or order is not a final judgment; and that the cause was not in a condition to render any judgment when it was made.

The motion came on to be heard October 17, and was opposed by an affidavit of defendant's attorney, sworn September 25; an affidavit of defendant's counsel, sworn September 25; an affidavit of said Arthur, sworn September 24; an affidavit of William T. Farnham, sworn October 16; an affidavit of defendant's attorney, sworn October 16; and an affidavit of James K. Warren, sworn October 16; also by the so called orders made on the denial of the application to postpone the trial, with sundry of the papers used on those applications.

On the hearing of the motion, the judge, before whom the same was heard, excluded the affidavit of Jeremiah Larocque, sworn October 11; also that of Joseph Larocque, sworn October 11; also all statements in the affidavits previously used as to remarks made by the judge on the trial, not showing the legal action and conduct of the court.

The motion was decided October 24, 1866. An order was entered November 21, 1866, on the decision, denying the motion.

From this order an appeal was now taken, and all the papers

above referred to were presented to the consideration of the general term.

Jeremiah Larocque, for appellants.

H. A. Cram, for respondent.

*By the Court.**—JONES, J.—The first question to be determined is: assuming the defendants to be entitled, on the merits, to the relief they ask, have they pursued the proper course to obtain it?

Under the law as it stood in this State prior to the Constitution of 1846, a decision by a circuit judge refusing to postpone the trial of a cause, on the ground of the absence of material witnesses, was regarded as so far affecting a substantial right as to be subject to review, and, if erroneous, to reversal. (Ball *v.* Lord, 14 *Johns. R.*, 341; Ogden *v.* Payne, 5 *Cow.*, 15; Hooker *v.* Rogers, 6 *Cow.*, 577; People *v.* Vermilye, 7 *Cow.*, 369, cited from p. 385.)

There are many decisions as to what are and what are not sufficient causes to entitle a defendant to a postponement, as to the papers and contents thereof on which he should apply, as to what circumstances will justify a denial of the motion, and as to what terms can be imposed as a condition of granting it, and the subject occupies considerable space in the works of the various text-writers on Practice. (*Grah. Prac.*, 284 to 289.)

If the judge had uncontrolled discretion to grant or refuse a postponement, these numerous decisions could never have been called forth, nor would the learned text-writers have devoted so much space to the discussion of the subject.

I do not find that the Code, or any legislative enactment or judicial decision, has altered the law as it stood, in this respect, prior to 1846.

The power of a judge, sitting at the trial of a common-law action, to grant or refuse a postponement, is not now, any more than it was then, within his uncontrolled and uncontrollable discretion; but that power must still be exercised

* Present, BARBOUR, JONES and GARVIN, J.J.

according to the established rules and principles; and his decision is subject to review, and, if erroneous, to reversal; unless the right to such review has been taken away.

The questions then arise: has such right been taken away? If not, in what mode, and by what course of procedure, can such review be now obtained?

Before considering these questions, it will be well to inquire whether, as this is an action which would formerly have been a suit in equity, the defendant, under the present system, was entitled to a postponement of the trial, on the same grounds, and for the same reasons, as a defendant to an action at law is entitled to a postponement thereof;—and, whether a decision denying such postponement, in an action of this character, is subject to review, the same as a similar decision in an action at law.

I have been unable to find any decisions by the late court of chancery upon the subject of putting off the hearing of a suit by reason of the absence of witnesses, or as to whether a decision refusing such postponement is subject to review. From the nature of the proceedings in equity, one could hardly expect to find such decisions.

As an almost invariable rule all the testimony in an equity suit was taken, prior to the hearing, before an officer of the court, under an order to produce witnesses within forty days. This time could be extended once, *ex parte*, and after that could be further extended upon notice. (*Hoff. Chy. Pr.*, 406.)

When the cause came to a hearing, it was heard upon the written testimony of the witnesses as taken by this officer. It necessarily follows that motions to put off a hearing by reason of the absence of witnesses, would rarely (and but for the exceptions hereafter mentioned, would never) arise. All motions for time to obtain the testimony of witnesses would necessarily arise on application to extend the time of the running of the order to produce witnesses.

I find it laid down in a standard work on equity practice, without the citation of any decisions to support the proposition, that the court will grant one extension of time, *ex parte*, on being satisfied that no unreasonable delay has taken place in taking the testimony, or upon some excuse for neglect as

sickness, or unavoidable absence of the client or solicitor (*Hoff. Chy. Pr.*, 467), and as a further extension could be obtained on special motion, upon notice to the adverse party, it necessarily follows that when a reasonable ground for a further extension was shown, it would be granted.

What would be a reasonable ground for such further extension we are not informed by any decisions in this State, but it may be fairly deduced from the practice of the court in granting an extension, *ex parte*, that the same grounds which authorize such order *ex parte*, will, if satisfactorily established after opposition from the adverse party, call for a further extension.

Thus the principle of the rule upon which courts of law act in postponing trials is equally applicable in courts of equity; and that principle is to give a party who is guilty of no negligence a reasonable opportunity to produce his witnesses. A court of equity surely cannot be more rigorous than a court of law in its requirements of a party who seeks a further opportunity to procure his testimony. It is, therefore, safe to say that a court of equity would always extend the time of the order to produce witnesses when a case was presented, such as would call on a court of law to put off a trial.

As there are no decisions concerning the proceedings to be taken on an application for an extension of the order to produce witnesses, so there are none on the question as to whether a decision denying such application can be reviewed, or if it can be, how it is to be reviewed; but the power to review and the mode of such review is apparent from the plenary powers of the chancellor who had *entire control* over every act and order of the vice-chancellors by means of an appeal. (*Hoff. Chy. Pr.*, 3.)

Under so full a power as the chancellor possessed, it would be singular if the question of his supervisory power over so important an order as the prevention of a party from producing his testimony had ever been mooted.

It may be, that if the chancellor himself denied a motion to extend an order to produce witnesses there could be no review; it is manifest that in such case there could be no review in the court of chancery, for the chancellor was the head of

that court and no other court could have power to review unless given by statute; if, then, it be true that in such case there could be no review, it resulted from the fact that the legislature did not see fit to give a writ of error in such cases to the court of errors. But the fact that a right to a review of a decision made in one court is not given to a party by way of appeal to another court, does not militate against the existence of such right in the court in which the decision was made.

I have said above, that, but for exceptions to be mentioned, a motion to put off a hearing by reason of absence of witnesses would never arise.

These exceptions are that some matters were allowed to be proved orally at the hearing, and that, under the revised statutes (2 *R. S.*, p. 180, 1st ed.) an examination of witnesses might have been had before a vice-chancellor, in which case, by rules established by the chancellor, the testimony was to be taken either in the mode adopted at *nisi prius*, or in the mode in which an examiner took it; the examination was to proceed *de die in diem*, and if a material witness could not be procured at the time and place assigned, the vice-chancellor might postpone the taking of the testimony to some future day on payment of costs or otherwise in his discretion, and upon such terms and conditions as he might think proper.

In the first of these cases it might, it is true, become necessary to move a postponement of the hearing, on the ground of the absence of a witness; and in the second, to move a postponement of the examination.

The absence of decisions upon motions to postpone made in these two cases, is not at all surprising. In the last, even an examination before a vice-chancellor was very rare, so much so, that, since the year 1830, the assistant register never knew an instance. Such examination, moreover, was never granted, except in special cases, and was then set down for a particular time and place. It is hardly probable that counsel, in such special cases where the day assigned could be arranged to suit their convenience and that of the witnesses, would ever be unprovided with their witnesses, except for some unforeseen matter occurring after the assignment of the day.

In the first case, proof at the hearing was confined to the

verification of exhibits and was scarcely ever permitted, except when mere handwriting was the only thing to be established. With such a limited area for the introduction of oral proof at the hearing, occasions requiring a postponement by reason of the absence of witnesses, could rarely arise.

If, in either of these cases, a motion for a postponement had become necessary, I think there can be but little question it would have been disposed of on principles analagous to those which obtained on an application for an extension of an order to produce witnesses, and by the same analogy a decision denying the motion would have been subject to the supervisory power of the chancellor.

It is thus apparent that the mere fact of this being a case which would formerly have been a suit in equity, does not render either the principle that a party should have a reasonable opportunity to procure his testimony (which principle lies at the foundation of the common law rules relative to putting off trials), or the common law principle that a denial of such an opportunity is reviewable, inapplicable to it. In fact these principles obtained to the same (if not to a greater) extent in equity as in courts of law; the only substantial difference being that in equity they were almost invariably invoked on a motion for time to produce witnesses, while at common law they were invoked when a cause was called for trial by a motion for a postponement. This difference was a necessary consequence of the modes adopted by each court for the trial and disposal of issues.

But now the cumbrous machinery through which an issue of fact was disposed of in the court of chancery, consisting of orders to produce witnesses, taking the testimony of the witnesses in writing before an officer of the court, moving to suppress the depositions, and finally hearing the cause on the written testimony remaining after all motions to suppress, expunge and re-examine had been disposed of, is, with the court of chancery, swept away, and a much more simple mode of trial similar to that at *nisi prius* substituted.

The trial of an issue of fact in an equity suit is now brought on and conducted in the same way as a similar issue in an action at law, with the single exception, that the same is not

tried before a judge and jury, but before a judge only; as there is no jury, of course, all the rules and principles relative to the empanelling, swearing, challenging, charging and refusing to charge the jury, to the separation, misconduct and verdict of a jury, are inapplicable to the trial of an action in equity.

One of the great differences between the former (chancery) and the present mode of trying an issue, in an equity suit, is, that in chancery it was the general rule, that all the testimony (with but few exceptions) must be taken out of court, and the cause heard on the written testimony; whereas, now, the general rule is the same that obtains in the trial of issues at law, viz.: that all the testimony must be taken orally before the judge trying the cause. The exceptions, where it need not be taken orally before the judge trying the cause, apply equally to actions at law as to those in equity.

The parties to a suit in equity must now (except in special cases, which apply as well to actions at law) have their witnesses present in court, at the time the cause is called for trial, so that they may be examined orally, precisely as they are required to have them in an action at all. This being so, I can perceive no reason why a party defendant should not have the same reasonable opportunities to obtain his witnesses, in case they are not present, as are granted to him in an action at law, upon his showing the same grounds to exist therefor. I have shown, there is nothing in the principles of equity, or in the practice of the late court of chancery, which would forbid his having such opportunities. The common-law rule, requiring witnesses to be examined orally before the tribunal which tries the cause, having been substituted in place of the former equity rule, it must carry with it the right of a party to apply for an opportunity to produce his witnesses, in the mode which then and still exists in actions at law, viz.: a motion, when the cause is called for trial, for a postponement of the trial. As a concomitant to this right to move a postponement, there must, also, exist a right to review a decision denying the motion to postpone, either in such mode as then obtained in actions at law, or such mode as may have been substituted therefor, since a

right to review a decision denying a reasonable opportunity to procure witnesses was recognized, both at law and in equity; and since the mode of reviewing such decision in equity has become inapplicable, in consequence of the abolition of the chancery mode of taking testimony, and the mode of review in actions at law, has become applicable, in consequence of the substitution of the common-law in place of the chancery mode of taking testimony.

It may, however, be suggested, that as equity actions are tried before a judge, without a jury, and as he can have, or can himself extend, his term as long as he pleases; and as he can attend at any adjourned day; and as he will have necessarily heard all the testimony; he can try a cause piecemeal, like a referee, and, by adjourning the trial from time to time, do justice to a party who, at the time the trial was called on, was without any, or some one, of his witnesses, and had a good excuse for not having them in attendance; and therefore the rules that apply to actions at law, do not apply to suits in equity—at least, not to their full extent. That full justice may thus be done, in this way, is perhaps doubtful; but, conceding that it could, still, such a mode of trial seems to me incompatible with the spirit and intent of the present Code of Procedure. That spirit and intent is, clearly, that the trial before the court (in which manner actions in equity are to be tried) is, when commenced, to go on *de die in diem*, the same as trials by jury. True, the judge may have a discretion as to suspending a trial to permit the production of a witness who has unexpectedly left the court room, or to permit the obtaining of testimony, the necessity of which, first became apparent on the trial; but he has the same discretion on a trial by jury. In a trial by the court the suspension may, perhaps, be for a longer period than in a trial by jury, but the discretion to suspend should be exercised with great caution, and in the case of a trial by jury, the suspension should never extend beyond the next court day, while in a trial by the court it should never, without the consent of both parties, be for a period longer than two days.

There does not appear to be any substantial reason why, under the present system, there should be any difference be-

tween the conduct of a trial by the court and a trial by jury, save in those matters above referred to which have reference to the jury and to the length of time for which a trial may be suspended.

No such difference should be inaugurated. A glance at the various terms of the court and the judges assigned to hold them, will show how extremely inconvenient, if not wholly impracticable, it would be for the various judges to extend their special terms into the periods at which they are to hold jury trial or general terms, thus interfering with their other duties and disarranging the whole business of the court. There is one case in which the judge, either at a trial by the court or a trial by jury, may properly exercise a discretion in extending his term, and this arises from the necessity of the case. It is when a cause, commenced and proceeded with from day to day, is at the expiration of the term unfinished; in such case the term may well be extended so as to enable the cause to be finished, otherwise all the previous labor and time expended on it will be lost. But judges are exceedingly careful to prevent, even, this cause for an extension of term arising.

One other suggestion may be noticed, that in equity causes, after the judge has made his decision on the trial before him, an account may frequently be ordered by that decision to be taken by a referee, which cannot be taken during the continuance of the term, and therefore there is a necessity for extending a special term, which does not apply to a trial term. But this is not so. The taking of such account by a referee forms no part of the trial. It arises out of and is founded on the decision made at or after the close of the trial, but it is an entirely distinct proceeding in the cause. The referee's report may be confirmed by a judge other than the one who tried the cause. A party dissatisfied with the report must except to it; and those exceptions may be heard and disposed of by a judge other than the one who tried the cause, by either overruling them and confirming the report, or by sustaining them and sending back the matters before the referee, and from an order made in this respect at special term, an appeal will lie to the general term. Finally, judgment in a cause may be entered by a judge other than the one who tried the cause, and other

than the one who confirmed the referee's report; such judgment must be founded on the decision of the judge who tried the cause, and the confirmed report of the referee, and must conform thereto, although it may contain other directions which are necessary to carry out the decision of the judge who tried the cause.

These principles are fairly deducible from the case of Chamberlain *vs.* Dempsey, lately decided by the court of appeals.

It follows from these principles that the taking an account by a referee pursuant to a decision made by the judge at or after the close of the trial of a cause by the court, the hearing of exceptions to the report of the referee, its confirmation and rendition of judgment constitute no part of the trial of a cause, but are distinct steps and proceedings in the cause; it is therefore wholly unnecessary to extend the term at which the trial is held until these steps and proceedings have been had.

It must however be distinctly understood that it is not intended to deny the power of a judge in an action triable by the court to commence the trial, and then, with the consent of both parties, to adjourn to a time beyond his then term when he will not be engaged in other duties of the court, and, if necessary, to have his term extended to that time; but this power is one which should be but rarely exercised even with the consent of both parties, and then with extreme caution. It is, however, intended to distinctly deny the power of a judge in a cause triable by the court, after he has commenced the trial of a cause, then against the objection of either party, to suspend the trial to a future day, or to extend his term under like objection for the purpose of going on with the trial, except as above stated, he may suspend the trial for a short time, say at the furthest, two days, to enable a party to procure a witness who has suddenly left the court room, or to procure testimony, the necessity of which first became apparent on the trial, and may also when the trial of a cause has been commenced and proceeded with from day to day, but is not finished at the expiration of the term, extend his term sufficiently long to enable the cause to be finished, proceeding therein from day to day.

I have consequently come to the conclusion, that the practice which prior to 1846 obtained only in actions at law of

moving to put off a trial for the term, together with the rules and principles which regulated such motion are now applicable to all actions, whether they are actions which would formerly have been denominated actions at law, or such as would have been denominated suits in equity; and if such motion be denied in an action of the latter class, there is the same right to review the decision as if it was made in an action of the former class.

This point having been established, I will now consider the questions (which were passed for the purpose of considering the one just disposed of) whether the right of reviewing a decision denying a postponement has been taken away, and if not, then in what mode and by what course of procedure such review can now be had?

These questions are so intimately connected that the reasoning applicable to the one naturally runs into that applicable to the other; they will therefore be considered together.

Under the judicial system that existed prior to the adoption of the constitution of 1846, a party defendant who claimed error to have been committed at circuit in refusing his motion for a postponement of a cause, could pursue one of two courses to procure relief from such error.

First.—He could voluntarily permit his default to be taken, and then, upon affidavits showing the application made at the circuit to put off the trial, the papers on which it was founded, its denial, and that an inquest had been taken against him make a non-enumerated motion to the supreme court to set aside the inquest (Ogden *vs.* Payne, 5 *Cow.*, 15): or he might appear and contest on the merits; and if the cause went against him pursue the same course to obtain a new trial. (Hooker *vs.* Rogers, 6 *Cow.*, 577).

Second.—He could appear and contest on the merits; and if verdict passed against him, then make a case, and on an enumerated motion to the supreme court, move for a new trial on the ground of error in refusing a postponement as well as on the ground of any other error committed on the trial. (People *vs.* Vermilyee, 7 *Cow.*, 369, 385). It cannot be doubted but that every court of record has now, in causes depending therein, the same power to hear motions and set aside

proceedings for irregularity, and review decisions made at a trial, as the former supreme court had in causes depending therein, unless such power has been taken away or restricted by some subsequent statutory provision.

I have been unable to find any statutory provision expressly taking away or restricting either the power to set aside an inquest or default resulting from a denial of a motion to put off a trial, or the power to review such decision on a motion for a new trial on a case. If either of these powers have been taken away or restricted, it must be because no means have been provided for the hearing of the motion. But I think ample means have been provided. There has been a mere change of the forum in which the motions are to be heard. At one time, in the former supreme court, all enumerated and non-enumerated motions had to be heard at a general term of that court. At this time both an enumerated motion for a new trial on a case, and a non-enumerated motion to set aside an inquest had to be made at a general term. Afterwards, in 1830, an act was passed creating special terms of the supreme court for the disposal of non-enumerated motions; and thus the forum for the hearing of these motions (with a few exceptions) was changed from the general to the special term. Afterwards, in 1832, an act was passed requiring certain enumerated motions, among them, motions for a new trial, to be made, in the first instance, before a circuit judge. Thus, the forum for hearing these motions, in the first instance, was changed.

Under the present system, the following enumerated motions, among others, to wit: a motion for a new trial, on a case or exception, *or otherwise*, is to be heard at a special term or circuit, in the first instance, except that exceptions may be heard, in the first instance, at a general term, if the judge trying the cause so order at the trial. (*Code*, § 265.) All non-enumerated motions must be heard at special term, except when otherwise directed by law (*Rule* 40 *of General Rules*).

Thus ample means are provided for the hearing and deciding of all those enumerated motions for a new trial on a case, and all those non-enumerated motions to set aside proceedings which, during the existence of the former supreme court, were heard and decided by it.

It is however strongly insisted, that a decision made in a cause by one judge of a court, cannot, on a subsequent proceeding in the same cause, be overruled by another judge of the same court, as the two judges are possessed of equal powers and jurisdiction; and therefore a motion of this character cannot be made at special term, but the relief must be obtained by appeal from the judgment. The right of one judge, on a proceeding before him in a cause to reverse a decision made by another judge of the same court in the same cause, depends, in a great measure, on the judicial system adopted by a government. This State has chosen to invest one judge, on certain proceedings had before him, with power to reverse a decision made by another judge, in previous proceedings had before him.

Thus section 265 of the Code provides, that all motions for a new trial, upon a case or exceptions, or otherwise, shall be heard, in the first instance, at a circuit or special term.

Under this section, this court holds, that where a motion for a new trial is made at a special term, the judge holding the term, although he may not be the judge who tried the cause, is bound to hear the motion and examine it on its merits; and if he is unable to concur in the views of the judge who presided at the trial, then to reverse his decision, and order a new trial. Were this not so, parties would be subject to the delay of waiting until the judge who had presided at the trial held a circuit or special term, and, in this district, until he held a special term.

I am aware that the usual course has been, for the judge at special term to deny the motion for a new trial, *pro forma*; but he is not obliged to do so, although he may be so requested by the parties. And it may be somewhat doubtful whether he has any right to do so. Indeed, in some cases, where it appeared on the face of the order that the motion was denied, *pro forma*, the general term has refused to entertain an appeal.

At all events, if either party desire it, he is bound to examine the case and make an actual determination of the questions involved.

This reviewing of a decision made by one judge in a cause,

by another judge of coördinate power in a subsequent proceeding in the same cause, is by no means new.

In the time of the former supreme court, one circuit judge was authorized, on a bill of exceptions, demurrer to evidence or case made, to review a decision made by another circuit judge on the trial of the cause. (*Laws of* 1832, 188.)

Such a review is therefore not antagonistic to our judicial system.

Now this motion is one which, under the former system, would have been a non-enumerated motion. Its character has not been changed and it must therefore, under our present system, be heard at a special term by the judge who may preside when the motion is moved, and such judge is as much bound to hear it, although it involves a review of a decision made at the trial of the cause by the judge who presided thereat, as he would be to hear an enumerated motion for a new trial on a case involving a similar review.

The conclusion to which I have arrived is, that a party defendant who feels himself aggrieved by a refusal to postpone the trial, whether such refusal be made on a trial by jury or a trial before the court, may withdraw from the trial, and if the trial proceeds, and the cause is decided against him, he may, upon affidavits showing the application to postpone, the papers upon which it was founded, its denial, and that a decision has been made against him, make a non-enumerated motion at special term to set aside such decision; he may also remain and try the cause on the merits, and in case of a decision against him, either pursue the same course to obtain a new trial, or may, if the trial was by jury, under section 265, move at special term on a case for a new trial, alleging as one of the grounds of error the refusal to postpone the trial; or if the trial were by the court, then, under section 268 may appeal direct to the general term alleging as cause for reversal the refusal to postpone.

In this case, defendant adopted the first course. After the denial of his motion to postpone, he withdrew and suffered a default. They proceeded to take an inquest against him. The trial was finished. The judge decided the cause against him; and made and filed his decision, in writing. This ended

the trial, as I have shown above. The defendant then moved at special term to set aside this trial and decision.

Under the view above expressed, the motion was properly made, and should have been heard and decided on its merits. As it was not so heard and decided, the order below should be reversed. But the authority of the general term on appeals from orders is not confined to a simple reversal or affirmance, but it may make such order as the special term should have made in the first instance. I shall, therefore, proceed to examine the matter on the merits, with a view of determining whether defendant's motion should be granted.

[The court then proceeded to examine the case on the merits, and concluded that the order of the special term should be reversed, and the inquest and subsequent proceedings had thereon should be set aside, and a new trial ordered.]

Order accordingly.

LOVEE *against* CARPENTER.

New York Common Pleas; Special Term, October, 1867.

EXECUTION AGAINST THE PERSON—WHEN REGULAR.

It is not necessary to sustain an execution against the person, that the liability of the defendant to arrest should appear by the judgment. Arrest is a provisional remedy; and when the facts which authorize it are extrinsic to the cause of action, they may be shown by proof outside of the judgment record.

Motion to vacate an execution against the person.

A judgment having been obtained by Henry Lovee against Josiah Carpenter, an execution was issued thereupon, under

which the defendant was arrested. The defendant having obtained an order to show cause why the execution should not be vacated, upon the hearing raised the objection that the *judgment record* did not show the liability of the defendant to arrest.

BRADY, J.—The question presented on this motion was passed upon in Corwin *v.* Freeland (2 *Seld.*, 560), and that case is referred to and approved in Smith *v.* Knapp (30 *N. Y.*, 581). If an order of arrest be obtained before judgment, an execution against the person which is predicated on such order may be issued, although the action, *eo nomine*, be one in which the defendant may not be arrested. The arrest of a defendant is a provisional remedy, and the facts authorizing it may be shown *dehors* the complaint. In an action to recover for money lent or goods sold, &c., the amount of the claim, and therefore of the recovery, is dependent upon the sum loaned, or the price of the goods sold; but the right to an order of arrest may depend upon the manner in which the loan or the goods were obtained; if accomplished by fraud, then the order may be demanded. If the defendant has removed, or is about ro remove, or has secreted his property with intent to defraud his creditors, he may also be arrested. Neither of these elements necessarily form a part of the plaintiff's case. He may recover the debt alleged, by proving it to exist, and nothing more. The right to arrest may be regarded as a punitory enlargement of the remedy against the defendant, the effect of which may be advantageous to the plaintiff. As the right to arrest does not rest, therefore, upon the form of the action, the judgment record may not show any right to issue an execution against the person, and in such a case the plaintiff may resort to evidence *aliunde* to justify the issuing of such a process. For these reasons the objection taken must be overruled.

ROBERTS *against* LEVY.

New York Common Pleas; Special Term, November, 1867.

ENFORCEMENT OF COVENANTS.—EVIDENCE IN MITIGATION OF DAMAGES.—PARTIES.

A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected on such lots shall be set back a specified distance from the line of the street on which the lots front—is a covenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of and against any subsequent grantee of either lot.

A subsequent purchaser of a lot subject to such a covenant, may be restrained from building in violation of the covenant.

Such a covenant constitutes an "incumbrance" upon a lot to which it applies; and if the covenantor subsequently conveys by a deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed.

The right of action for damages for the breach of a covenant against incumbrances may pass, in equity, as an incident, by force of a conveyance of the land itself as the principal thing.

The fact that a covenant constituting an incumbrance was upon record, whereby one who bought the land under a subsequent deed containing a covenant against incumbrances had *constructive* notice of it, does not affect his right to recover damages for the breach of the latter covenant.

But if such purchaser had *actual* notice of the incumbrance at the time when he accepted the deed, *it seems* that this fact may be proved in mitigation of damages.

Trial by the court.

This action was brought by Marshall O. Roberts against Mark Levy, to recover damages for a breach of covenant arising out of the following facts. On the 9th day of July, 1860, the defendant, and Sarah his wife, for a valuable consideration, by deed of indenture, conveyed to one Ann B. Phinney, in fee-simple, a parcel of land situated on the north side of Fourteenth Street, in the City of New York, described in the deed as beginning on the northerly side of Fourteenth

Street and bounded by four lines, one of which was specified as running easterly "along the northerly side" of Fourteenth Street.

Subsequently, and on the first day of May, 1863, the defendant, with Sarah his wife, by deed of indenture, conveyed to Ann B. Phinney, in fee-simple, another parcel of land, adjoining the lot above described, and which in the deed of conveyance was in like manner described as beginning on the northerly side of Fourteenth Street and bounded by four lines, one running "along the northerly side of Fourteenth Street."

Each of the said deeds contained the following covenants: That the premises thereby conveyed were "free, clear, and discharged and unincumbered of and from all other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever." And also "the said Mark Levy" (the grantee and defendant herein) "and his heirs, the above and hereby granted and released premises and every part and parcel thereof with all appurtenances unto the said party of the second part" (the said Ann B. Phinney), "her heirs and assigns, against the said party of the first part" (the defendant herein and wife), "and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents for ever defend."

At the time of the execution of the above deeds by defendant and his wife, the premises were in fact subject to a certain covenant and agreement entered into on the 26th day of May, 1845, between one John Townelle, who was at the time of the making of the covenant and agreement the owner of the parcels of land in question, and E. C. Connell, James McCullough and others, the owners of certain lots lying west of them on the northerly side of Fourteenth Street, which covenant and agreement was as follows:

"Deeming it advisable and for the benefit of all and each of us, and for those who may *hereafter derive under us*, that the buildings to be hereafter erected on the above mentioned lots," (said lots being from number one to number twenty-one, inclusive, and belonging to the several parties to the said agreement, including the two lots above mentioned) "shall *be set back*

from the present building line of said Fourteenth Street, in an equal line, and distant, northerly, therefrom, *eight feet,* so that all the buildings on said lots, so far as respects the fronts thereof in distance from the line of said Fourteenth Street, shall be uniform: We therefore, each of us, proimse for ourselves, our heirs, executors, administrators and assigns, to observe and perform this agreement the one with the other, and all of us in perfect good faith according to the true intent and meaning of this agreement."

This agreement was duly acknowledged and recorded. The two lots of land above described were a part of the estate of said John Townelle, one of the parties to the above agreement, and the defendant purchased them at a sale in a partition of the estate of Townelle made by order of the supreme court on the 11th March, 1859. In the report made by the referee appointed to examine into the title on such partition, he refers to the restrictive agreement above set forth, made between Townelle, Connell, and others, on the 26th May, 1845.

Ann B. Phinney (the grantee of defendant), died seized of the two lots above described; and on the 16th day of May, 1864, Theodore N. Phinney, executor, and Susan Phinney, and Mary D. West, executrices of the said Ann B. Phinney, by deed of indenture of that day, conveyed for the consideration of eighteen thousand five hundred dollars the above mentioned two lots situate on the north side of Fourteeth Street to the plaintiff. This deed of conveyance to the plaintiff was in the usual form of *executor's deeds;* it conveyed all the right, title and estate which the testator, Ann B. Phinney, had in the two lots at the time of her decease, and contained covenants against any act or acts of the executor or executrices by or through which the said lots could be charged or incumbered.

The plaintiff claimed in this action that in consequence of the aforesaid agreement on the 26th May, 1845, and the restrictions and covenant therein contained, the two lots purchased by him were incumbered, and the value of the premises diminished; and that he had been damaged thereby.

The complaint averred that, relying upon the covenants contained in the deeds of the defendant to Ann B. Phinney, of the dates of July 9, 1860, and May 1, 1863, and in *ignorance* of the

restrictions and incumbrances upon the premises created by the said agreement of May 26, 1845, the plaintiff employed an architect and caused plans and specifications to be made for a building for theatrical and other purposes, which should cover the entire premises, consisting of the two lots in question, conveyed by defendant to Ann B. Phinney, and by her executors to plaintiff. That under such plan, the plaintiff excavated earth, and built walls so as to cover the entire premises. That under threats of injunction made by owners of the adjoining lands, claiming under the agreement of May 26, 1845, plaintiff was obliged to pull down and remove a large portion of the wall he had built, and to fill up the excavations he had made, and to change the plan of his building. For these things, he claimed to recover damages from the defendant on the ground of a breach of the defendant's covenant in his deed to Ann B. Phinney, which damages he laid at the sum of $10,000.

The action now came on to be tried at the special term.

Phelps & Fuller, for plaintiff.

P. J. Joachimsen, for defendant.

VAN VORST, J.—The agreement made on the 26th May, 1845, between John Townelle, the then owner of the two lots of ground in question, with E. C. Connell and others, owners of adjoining lots on the street, by which the buildings which might thereafter be erected on the lots owned by the parties to the agreement, were to be set back from the building line of the street in an equal line, eight feet did not constitute a *dedication* of the space so to be left open, in front of the buildings, to the public. But it is such an agreement as a court of equity will enforce between the parties to it, the one against the other, and in favor of and against any subsequent grantee of any of the lots. By the terms of this instrument a right, in the nature of a servitude or easement in the several lots, was created in favor of each owner in all the lots to which it relates. (Parker *v.* Nightingale, 6 *Allen*, 341.)

It is obvious that the parties to this agreement intended to impose a *permanent* restraint on the mode of occupation of their several lots, so far as the eight feet in question was

concerned. This space it was agreed should not be built upon. It was agreed that it was for the benefit of all concerned that it should be left open. It is very certain from the language of this agreement that the parties meant that this restriction should be a permanent charge on each lot, not only in favor of the then owners, but also of those who should derive title through them.

With such an easement and charge fastened on the two lots, to which the plaintiff has acquired title, through one of the signers of the agreement, it is quite clear that he could be restrained by the owners of the adjoining lots from building up to the street line. Plaintiff is as much bound to leave this space open in front of these two lots, in pursuance of the agreement between the original owners, as though he was actually a party to it. (Tallmadge *v.* East River Bank, 26 *N. Y.*, 105; Hubbell *v.* Warren, 8 Allen, 173; *Washb. on Easem.*, 63–65.)

This agreement creating this permanent easement on the two lots in question, is an incumbrance on the land, and runs with it; the grantee cannot remove it, except by the consent of all interested. The grantee is absolutely prohibited from using the restricted portion, except in a certain way. (2 *Washb. on Easem.*, 658, §§ 13, 14.) The conveyances from the defendant to Ann B. Phinney contained a covenant that the premises conveyed were free, clear, discharged and unincumbered, from all charges and incumbrances of what nature or kind soever. The existence of this easement at the date of the conveyance of the property by the defendant, was a breach of the covenants in his deeds, and one of which the grantee, Ann B. Phinney, could have taken advantage in her lifetime, by action for the recovery of such damages as she could establish as incident to the breach.

The covenant against incumbrances is a personal covenant. If not true, there is a breach the instant the deed is executed.

A broken covenant does not run with the land; nor does it pass to the grantee in a conveyance of the land (3 *Kent's Com.*, 471). It is a chose in action, and the right of action is supposed to remain in the covenantee and his personal rep-

resentatives. (*Rawle, Cov. of Title*, 374; Beddor *v.* Wachsworth, 21 *Wend.*, 120.)

It was formerly the practice, upon the theory that a chose in action was not assignable, to allow an action to be brought for the breach of the covenant by the covenantee for the benefit of his grantee.

But I am of the opinion that all the remedies which Ann B. Phinney or her personal representatives had for a breach of the covenants in defendant's deeds, passed to the plaintiff under the executors' deed to him. The transfer of the land, the principal thing, should be held to imply in equity an assignment of all remedies under the covenant (*Rawle*, 377).

The fact that the agreement creating the restriction and easement was a *matter of record*, and that plaintiff had *constructive notice* thereof, is not enough to affect or defeat his remedy. I am of the opinion that it would be otherwise, if *actual* notice had been brought *to him* or his *agent* at the time he took the deed.

If the plaintiff at that time actually knew of this agreement, evidence of such fact should be received by the referee hereafter appointed in mitigation of damages. Such evidence is not a contradiction of the deed, although it does not except the easement in question (Rycker *v.* Snyder, 9 *Wend.* 416.)

In fact I think that with actual knowledge the recovery of the plaintiff should be nominal only, not extending even to the moneys laid out by him in the attempted improvement of the eight feet, or the expenses incident to a change of his plan, because under such circumstances he went on in his own wrong. And this is the more reasonable and equitable when it is considered that the *restriction in itself is not necessarily a source of damage.* The agreement asserts that the setting back of the houses eight feet was deemed by the parties to be beneficial to all concerned; this was doubtless so in contemplation of the property being used for private residences. With knowledge of the restriction, plaintiff would not be allowed to divert the property from such use as was deemed to be beneficial at the time he took his deed, and when defeated in such design, as far as the eight feet in question is concerned, by the force and effect of this agreement, seek to recover under the

covenants in defendant's deeds against incumbrances, the damages sustained by him in failing to carry out such attempt.

The plaintiff is entitled to recover in this action such damages as he can establish, incident to this breach of the covenants in defendant's deeds to Ann B. Phinney against incumbrances. The legal representatives of Ann B. Phinney have parted with the estate and have received an adequate consideration therefor. They can succeed in no action for damages for the benefit of the estate of the deceased. The agreement of the 25th May, 1845, operates upon and affects this plaintiff only. He it is who is restrained by its terms. Whatever damages flow from this breach he suffers. He is the real party in interest. That the broken covenant does not run with the land and pass to the assignee, but that the action may be brought in the name of the covenantees for the benefit of the grantee, raises only a technical scruple which is disposed of by the code of procedure; which enacts that all actions must be brought in the name of the real party in interest (*Code* § 111.)

It was stipulated on the trial, by the attorney and counsel for the parties to this action, that in the event it should be decided that the plaintiff was entitled to recover under the covenants against incumbrances contained in defendant's deeds to Ann B. Phinney, it should be referred to some suitable person to be appointed by the judge before whom the trial was had, to take proof of and ascertain and report the amount of damages which plaintiff is entitled to recover. It is directed, therefore, that it be referred to Nathaniel Jarvis, Jr., Esq., to ascertain and report the amount of such damages to the end that on the coming in of the report, judgment be entered herein accordinginly.

WHITE *against* BROWNELL.

New York Common Pleas; Special Term, November, 1867.

THE NEW YORK "OPEN BOARD" OF BROKERS.—TRIAL OF QUESTIONS OF MEMBERSHIP.—INJUNCTION

The Open Board of Brokers in the City of New York is not a corporation; nor is it a joint stock association; nor is it, as respects questions relating to the continuance or termination of membership in it, a partnership.

That board is a voluntary association of persons who, for convenience, have associated to provide, at the common expense, a common place for the transaction of their individual business as brokers.

The agreement which the members of such an association have made, upon the subject of membership, and what shall be the terms on which it shall be acquired, and the grounds and proceedings upon which it shall be terminated, must determine the rights of parties on that subject. A court of justice must recognize and enforce these provisions of the compact. It cannot substitute another contract for the one which the parties have made.

Provisions of the constitution and by-laws of the Open Board of Brokers in the City of New York, authorizing the expulsion of a member who should fail to perform contracts made at the board, with another member, examined and adjudged not unreasonable.

One who becomes a member in a voluntary association whose rules provide for expulsion upon certain grounds, and direct a mode of proceeding before a committee or tribunal of the association to ascertain whether, in a given case, such grounds exist, submits himself to these rules; and cannot, when they are invoked against himself (nothing unlawful or unconscientious in them being shown) resort to a court of justice to prevent them from being put in force. An injunction, against the tribunal of the association, or against an officer of the association charged with executing the decision of such tribunal, will not lie.

Motion to dissolve an injunction.

This action was brought by Cumberland G. White against John L. Brownell, president of the "Open Board of Brokers," and others, to procure an injunction restraining them from interfering with his privilegos as a member of that board.

It appeared that the Open Board of Brokers was organized in the year 1864, by S. L. Joseph, Samuel B. Hard, and seventy-

five other persons, their associates. The articles of association signed by them recited that "the rapidly developing interests of the country, and the increasing number and value of its commercial securities, require new and greater facilities for exchange and negociation; and such business can be successfully transacted only when there is the utmost confidence, and such confidence is begotten only by public, open, fair and upright transactions, where any party interested may and can know where and how such business is done; and the liberal spirit of the age demands for such transactions a public mart open to all;" and declared that for the purpose of supplying these requirements and demands, the subscribers associated themselves together.

The associates adopted a constitution and by-laws, and made provision therein for a room for the use of the board for the election of a president and other officers, for the formation of an executive committee, a committee of membership, a committee of arbitration, and a board of appeals. It also provided for the election of new members; elections to membership were to be made by ballot, and after the report of the committee on membership, whose duty it was to make diligent inquiry as to the qualifications of the applicant, the new member, upon signing the constitution and paying an initiation fee, was entitled to all the rights and privileges of a member. No person was to be eligible to membership unless he procured a government license as a broker. The constitution also contained clauses for the suspension and expulsion of members, and their readmission. It also provided that every member pledged himself to abide by the constitution, by-laws and rules of the association.

Under the provisions of the constitution several hundred new members were from time to time admitted to the board, with all the rights and privileges of the original subscribers.

It was declared to be the duty of the arbitration committee, to take cognizance of and exercise jurisdiction on all claims and all matters of difference between members of the board, and its decision was declared to be binding. It was provided, however, that an appeal from the judgment of the arbitration committee might be taken to the board of appeals, which

board should take cognizance of all cases of appeal from the judgment of the arbitration committee.

It was also provided, in the by-laws, that "as a means of mutual protection," it should be the duty of any member to report to the board all cases of defalcation of contracts of other members, and all cases of refusal or inability to pay differences, whereupon the president should declare the member so reported, suspended. From such suspension the reported member might appeal and demand a hearing before the executive committee.

In the year 1865, the plaintiff, who was a stockbroker, doing business in New York, was elected a member of the board. He paid his fee on initiation, and subscribed the constitution, and became entitled to all the privileges, and was subject to all the obligations of membership under the constitution and by-laws.

In May, 1867, the by-laws were amended so as to provide that whenever a member should be in default in any contract, and the fact should become known to the committee on membership, the committee, after due investigation, should report the same without delay, through their chairman, to the president of the board, who should at once declare the member so reported, suspended from all the privileges and immunities of the organization; that from such suspension the reported member might appeal within sixty days from the date of such suspension, and demand a hearing before the executive committee, who should give public notice at the board at least five days before such appeal, for the purpose of enabling any person interested to present objections, and that they should report the result of their investigation. If it should appear that the complaint was just, the declaration of suspension should be confirmed; otherwise it should be annulled.

It appeared that the association were the lessees, and were in the occupation of a building known as number 18 Broad Street, where the business of the association was transacted; and was the owner of a considerable amount of government bonds and other assets, the accumulation of initiation fees of members and of fines imposed. The sittings of the associates are held in the building on Broad Street, at stated hours of the day, in a large room, which partakes of the character of an

exchange or mart where gold, stocks, and other securities are bought and sold by the members dealing with each other; and the right to enter this room, and to take part in the sessions of the board, and to have free access to the same, and to transact business thereat, in the purchase and sale of stocks and other securities, as a broker, and as an associate, forms the principal right and privilege of a member of the board.

In the month of January, 1867, the plaintiff entered into a contract with Currie, Martin & Co., stockbrokers, and associates with plaintiff as members of the board, by which Currie, Martin & Co., purchased of the plaintiff one thousand shares of the capital stock of the Hudson River Railroad Company, at 128 per cent., "payable and deliverable at sellers option, this year, 1867, with interest at the rate of six per cent. per annum," either party having the right to call from time to time for deposits to meet the fluctuations of the market. Deposits were made by both parties to the contract, in the United States Trust Company from time to time, under the contract, to the amount of $55,000 each.

The Hudson River Railroad Company having adopted a resolution in April, 1867, increasing the capital stock of the company, permitted stockholders to subscribe for such new stock within a certain time, and upon certain conditions. On April 10th, Currie, Martin & Co., notified plaintiff that they elected to subscribe for the additional stock in the company, and that they looked to plaintiff for same. The plaintiff avers that he had no right to subscribe for the new stock; that he was not a stockholder, and that he would not have subscribed for such additional stock were he a stockholder, as he did not consider the stock to be a good and profitable investment.

On September 5th, 1867, Currie, Martin & Co. called on the plaintiff to deposit $10,000 further margin to secure the contract. The plaintiff refused to furnish it, whereupon they notified plaintiff that they would, under the rules of the board, purchase at the board 2,000 shares of the stock of the company, whereupon the plaintiff served on the president of the board a protest against the purchase of any shares of stock in the Hudson River Railroad Company, upon his account, under his contract with Currie, Martin & Co. The president of the

board did, under the rules, purchase the 2,000 shares of stock on plaintiff's account, which was paid for by Currie, Martin & Co., notice of which was given to plaintiff by Currie, Martin & Co., on the same day; the notice was at once returned by plaintiff, with a notice to Currie, Martin & Co., that he repudiated the transaction.

Currie, Martin & Co., then made a claim on the plaintiff for a large sum of money, as difference in their favor, and demanded payment thereof, which was refused by plaintiff.

On September 6th, 1867, Currie, Martin & Co., presented their claim and difference to the arbitration committee, and demanded an examination, inquiry, and decision upon the same. This committee appointed a meeting for such purpose for the 9th day of September. The plaintiff was notified to appear on that day before the committee, and interpose whatever defence or objection he might have to the claim and demand of Currie, Martin & Co. On the day the committee met, the claimants appeared before it and presented their claim, and gave evidence of the facts upon which it was based. The plaintiff did not appear before the committee. He declined and refused to be present, or to submit the matter to them; and served upon the chairman of the committee a notice in writing of such refusal.

The committee made their report, finding, in substance, that Currie, Martin & Co., were entitled, under the contract of February 18, 1867, to one thousand shares of the increased capital stock of the Hudson River Railroad Company, they having given notice to plaintiff that they elected to subscribe for the same; that default having been made by plaintiff in responding to the call for additional deposit, it was at the option of the claimants, under the rules of the board, to elect whether to cancel, to close, or to continue the contract, and that Currie, Martin & Co., did elect to close same. Judgment was rendered in favor of the claimant against plaintiff, in the sum of sixty-nine thousand six hundred and thirty-three dollars and thirty-four cents, with interest.

Plaintiff did not appeal to the board of appeals from the decision of the arbitration committee. After the expiration of the time to appeal, Currie, Martin & Co., caused the facts and

circumstances to be brought to the notice of the committee on membership. A meeting of this committee was held on the 10th of September; the claim and difference was investigated by this committee, and the committee reported to the president of the board that the plaintiff was in default in his contract with Currie, Martin & Co.

On the 19th September the president of the board declared the plaintiff suspended from all the privileges of the organization.

The plaintiff took an appeal to the executive committee of the board from such declaration of suspension, in pursuance of the provisions of the constitution. The president of the board took measures to have that committee called together to consider said appeal, and a meeting of the committee was held on the 25th September, in pursuance of the notice required, at which a quorum was not present; and before another meeting was held this action was commenced.

After the service of the complaint in this suit, a meeting of the executive committee was held to consider the appeal, of which plaintiff had notice. Plaintiff appeared before the committee, refused to prosecute his appeal, and protested against and forbid the committee from taking any proceeding or action in the appeal, and the committee took no further action.

The plaintiff charged in his complaint that several members of the arbitration committee were prejudiced against him and his claim, and had, before acting, expressed an opinion favorable to Currie, Martin & Co's view of the matter; that there was unnecessary delay in assembling a meeting of the executive committee; that the delay was occasioned by a disposition on the part of Currie, Martin & Co., and other members of the association, to deny the plaintiff justice; that the association, through its officers, committees, and members sufficient to control its action, has denied the plaintiff justice. He denied the claims made by Currie, Martin & Co., and insisted that his original contract with them was still in force. He claimed that his suspension was unjust, and would inflict irreparable injury on him in his vocation, as broker, by his exclusion from the rooms of the board, and exclusion from his rights and immunities as a member.

He prayed that the board and its officers, agents, and servants might be enjoined and restrained from in any manner interfering with him in the full and free exercise and enjoyment of all his rights and franchises as a member of the organization, or with his enjoyment, in common with other members of the association, of the right to enter the rooms and remain at all the sessions of the board, and to transact business thereat in the buying and selling of gold, stocks, and other securities, as other members do; or from treating him otherwise than as an actual and unsuspended member.

The defendant, Brownell, the president of the board, in his answer to the complaint, expressly and positively denied that either himself, or any other officer or member of the board, so far as he has any knowledge or information, had, at any time, taken any side, or combined, or in any manner acted with, or at the instigation of the firm of Currie, Martin & Co., against or to the prejudice of the plaintiff, or had in any way or manner desired or sought to deny the plaintiff justice, or to interfere in any way or manner, except so far as the constitution and by-laws of the board required them to interfere in the controversy between plaintiff and Currie, Martin & Co.; and all the statements to the contrary thereof contained in the complaint were denied.

An order of injunction was obtained by plaintiff on his complaint; and was duly served on the proper parties. The defendant Brownell, the president of the board, now moved for a dissolution of the injunction, on the complaint and answer; both of which were under oath.

William R. Martin and *Freeman J. Fithian*, for the motion.

George C. Barrett and *William C. Barrett*, opposed.

VAN VORST, J.—The open board of brokers is not a corporation; the obligations and rights of its members are not determined or fixed by any statutory enactment, general or special. It is not a joint stock association. There has been no contribution of capital by its members for the prosecution of business of any kind by the association. There has been no stock

issued to its members, nor can the individual members claim any rights of property in it as stockholders.

The association is engaged in no business, and does not devote its funds to the prosecution of any undertaking to produce profit or gain to its members; nor is it a copartnership; in its organization, the essential features which characterize a partnership are wholly wanting. There are no profits earned to be divided among the members, nor are there losses to be borne.

The constitution—the contract between the parties—does not establish copartnership relations between the members; the associates do not hold themselves out to the world as copartners, nor is there anything to show that they regard themselves, the one to the other, in that relation.

The association looks to a continued existence, unaffected by the death, resignation, suspension or removal of its members. If it was a simple copartnership, the death or retirement of an associate would dissolve it.

It is an established principle in the law of partnership, that if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership, and the civil law contains the same rule. (3 *Kent's Com.*, 53.)

The death of either party is, *ipso facto*, from the time of the death a dissolution of the partnership, however numerous the association may be.

But in this organization, although individual members retire, die or are expelled, the body lives.

The *status*, rights and obligations of this plaintiff are not therefore to be determined by a consideration of this association in the light of its existence either as a corporation, joint stock assocation or copartnership.

The Open Board of Brokers is a *voluntary association* of persons, who for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business, agreeing among themselves to pay the expenses incident to the support of a "*Mart*," in which each for himself, at stated hours of the day, and for his individual profit may prosecute his own

business and enter into separate engagements with his fellow members. The association does not share in the losses of the individual associates, each member takes his own gains, and individually sustains the losses incident to his engagements. The organization of this board grew out of a necessity for "new and greater facilites for exchange and negotiation incident to the rapidly developing interest of the country and the increasing number and value of its commercial securities." As the number of these securities had been largely augmented; so too the body of persons who dealt in them as purchasers and sellers for others had greatly increased, and new organizations were required to be formed and new places of business appointed to meet the wants of a growing and increasing business. The persons who formed this association were brokers. It is stated in the constitution that no person was eligible to membership unless he possessed a government license as a broker. A broker is an agent simply. He transacts business not for himself, but for another. He is a middle man, a negotiator between other persons for a compensation.

A stock broker deals in stocks of moneyed corporations and other securities, for his principal. It is a calling of great responsibilities, in which punctuality, honesty and knowledge are required.

Acting as the stock Broker does for others, it is important that all the engagements he enters into should be promptly and faithfully fulfilled, both by himself and the party for whom he contracts. Hence, the language of the agreement of the original associates is suggestive; "such business can only be transacted where there is the utmost confidence, and such confidence is begotten only by public, open, fair and upright transactions where every party interested may and can know where and how such business is done"—and, hence, "a great public *Mart*" open to all the associates was desirable.

It follows from the very nature of such an organization, with such objects, intents, and purposes, that there must be rules and regulations for the good order of the association, and such rules should be held to be conclusive as to the

mode of transacting business between the members, and as to the privilege of admission to, and continued enjoyment of, membership.

As this association is not organized in pursuance of any statute, nor are the terms of membership fixed by principles of the common law, it follows that the agreement which the members make among themslves on the subject must establish and determine the rights of the parties on the subject, The constitution of the association, and its laws agreed upon by the members, contain all the stipulations of the parties, and form the law which should govern. The members have established a law for themselves. No person is entitled to membership in the Open Board of Brokers except he is approved by the appropriate committee, voted for by the board, and shall agree to, adopt, and affix his name to the constitution, and, having done this, each member should stand by his contract. Each member is under an obligation to support it himself in all its details, and is under a duty to see to it that it is supported by others. "As a *means* of *mutual protection*, it is declared, by the by-laws, to be the duty of every member to report to the Board all cases of defalcation of contract of other members, and all causes of refusal or inability to pay differences."

The very existence of this body depends upon the faithful observance of its organic law by all its members.

The court must regard the constitution and laws of this board as the contract by which all the members are bound. The court cannot make any other contract for the parties than they have solemnly made for themselves. It is not the province of courts of law to make contracts for parties. It may explain, interpret, enforce, and, in some instances, where contracts are hard and unconscionable, relieve from them.

But there is no claim in this suit that the terms of this constitution, adopted by the plaintiff, are hard and unconscionable. The plaintiff does not ask to be relieved from his membership, he rather demands that he may be allowed to remain in the association, under the constitution; he does not wish to be suspended, or have his connection determined and ended. In an organization of the character of the Open Board of

Brokers, with its several hundred members, the business transacted at its rooms being daily large in amount, and the stocks and securities dealt in being ever fluctuating in value, it was not unreasonable to apprehend that there would be constantly occurring differences between members, acting as agents for others, in regard to the terms of contracts, and as to the obligations and duties of contracting parties under agreements often hastily made.

The temptation to avoid a contract in a rapidly rising or falling market, as the pecuniary interest of a party might prompt, rendered it imperative that some tribunal in the body of the association, should be appointed and agreed upon, to take cognizance of and exercise jurisdiction over all claims and matters of difference which might arise between members of the board. This appears the more important, as confidence in each other, and in the engagements which they might make, one with the other, and in the fairness, openness, and uprightness of their transactions, and in the certainty that their engagements would be fulfilled are announced as the causes which led to the organization. To be effective, their decisions should be prompt. As these engagements would be constantly maturing, it was eminently proper that a tribunal should be near to render speedy and exact justice. Confidence is the real life of such engagements; hence, the appointment of a committee of arbitration is a prominent feature in the constitution of this board, and, by the express assent of each member, jurisdiction is awarded to this committee in advance of all claims and matters of difference which might arise between the members. The associates have agreed, among themselves, that the decisions of this committee shall have conclusive force, and that the members shall be bound by them; and each member is truly bound by such decisions so far as they are made the basis of subsequent action in the board to secure its good government under its constitution.

Let us apply the above principles to the case before us. A claim and matter of difference arose between the plaintiff, a member of the board, and Currie, Martin & Co. also members, growing out of their respective rights and obligations, under a contract for the purchase of 1,000 shares of Hudson

River Railroad stock, agreed to be sold and delivered by plaintiff to them. This contract was made at the board, and between its members. It was in respect to a transaction embraced directly within the objects and purposes for which the association was formed. Currie, Martin & Co., claimed the right, under the contract, to subscribe for the increased stock proposed by the railroad company to be issued, and they elected to do so, and looked to plaintiff for the same. This claim to subscribe for the additional stock was not admitted by plaintiff. Currie, Martin & Co. claimed of plaintiff a deposit of additional margin under the contract, which was refused; they then notified plaintiff that they should, under the rules of the board, purchase 2,000 shares of said stock on plaintiff's account, against which proposed action plaintiff protested. The stock was bought by the president of the board under the rules, of which plaintiff was notified. He refused to recognize the transaction, or pay for the stock, and Currie, Martin & Co. paid for it, and made a claim and demand on plaintiff for a large sum of money, the difference in their favor. The justice of the claim was denied, and its payment refused by plaintiff.

This was a claim and matter of difference over which the arbitration committee had jurisdiction so soon as the case should be brought before it. It was presented to the committee by the claimants, and an examination and adjudication upon it demanded. A day for hearing was appointed, and plaintiff summoned to appear and answer, and interpose his defence. The plaintiff declined to appear before the committee, claiming that there was nothing to be submitted, and that there was no difference between him and Currie, Martin & Co.

Now, the facts clearly show that there was a real and substantial difference between these parties; claims were presented on the one side to a large amount, growing out of the contract, and denied on the other. If the parties had agreed in regard to their respective rights, then there would have been no claim or difference, but they were very far apart, The question is not whether the claim of Currie, Martin & Co. was right or wrong in itself, just or unjust. There was a difference, which

was to be adjusted, and of which the plaintiff, when he became a member, had agreed that the committee should take cognizance. The plaintiff seems to rest in the belief that because he denied that Currie, Martin & Co. had a claim, that therefore there was none in their favor; he would decide the matter for himself. Now it happens that much of the real business of courts of law arises from the assertion of a claim by the plaintiff and its entire denial by the defendant, yet the action proceeds to trial and final determination, and it is no uncommon occurrence that the party who denies the claim fails in his defence.

A claim "is a demand of a right or a *supposed right*, a calling on another for something due, or *supposed to be due.*" (*Webster's Dic.*)

And whenever there is a disagreement in opinion in regard to a contract, or a matter in controversy exists between the parties to it, there is a "*difference*" such as the committee might properly adjudicate, and of which it was bound to take cognizance.

The committee, in the absence of the plaintiff, heard and determined the matter upon the statements of the claimants, and rendered judgment in their favor. Plaintiff had a right to appear and make his objections, and set up his defence; this he refused to do. After the award was made, he could perform it and retain his rights as a member; this he declined to do. He might appeal to the board of appeals, and this he refused to do. Having made up his mind that Currie, Martin & Co. had no claim, he concluded that he need interpose no defence, nor take any steps to reverse the decision, and could treat the award as a nullity. The plaintiff cannot assume this position and still claim the rights of membership. He cannot invoke the aid of this court to protect him in all the rights and advantages of the association, and which he alleges are a great source of benefit to him, and still be allowed to disregard his duties under the constitution and laws of the board.

The plaintiff agreed, when he became a member, that the arbitration committee should take notice of all claims and differences between members, and that he would be bound by their decision. He refused either to acknowledge its conclu-

sive force, in a case in which he was interested, or to appeal from its decision. The constitution must be taken as a whole. The contracting part is an entirety. All its obligations are to be assumed and discharged; all its benefits are to be enjoyed. The enjoyment of the latter depend upon the performance of the former. Were it otherwise, the association would be of no real advantage to its members. It clearly appears that good faith in the observance of the constitutional obligations of the members was intended to furnish a test for the right of continued membership.

There was some discussion on the argument of this motion as to the right of the plaintiff to revoke his consent to the jurisdiction of the arbitration committee over the claim and difference in question. In an action in a court of law to enforce the award, such question might be raised. For the purposes of this action, under the facts of the case, it can give him no relief. If the plaintiff would revoke the part of his agreement with his associates which imposes duties and obligations upon him, he cannot insist, in a court of equity, that he shall be protected in the enjoyment of rights and privileges created by the same contracts. He that would have equity must do equity.

After the action had before the arbitration committee, no appeal having been taken, proper steps were taken to bring the facts and circumstances involved in this controversy between plaintiff and Currie, Martin & Co., and the default of plaintiff, before the committee on membership. The matter was investigated, and this committee reported to the president of the board that plaintiff was in default under the contract. The president of the board, as was his duty, declared the plaintiff suspended.

This suspension operates as a deprival, during its continuance, of all plaintiff's privileges as a member, including an exclusion from the rooms of the board; but this declaration of suspension is not final. There is reserved to the plaintiff a right of appeal to the executive committee. The jurisdiction of this committee is ample to render and do complete justice. It has full power to hear and *investigate* the matter, and to re-

port the result to the board itself; if it shall appear that the suspension is just, it shall be confirmed; otherwise it shall be annulled. The plaintiff has taken such appeal to the executive committee. He has placed his case in a way to be investigated, and finally decided by the board itself. Having gone thus far he pauses; he fails to prosecute his appeal; in fact has forbidden the appropriate tribunal to take cognizance of his appeal.

At this step, and with his appeal pending, he asks this court in effect to annul all that has been done by the association in the investigation and disposition of this matter by the officers and committees of the board. He asks this court to restore him to and protect him in the enjoyment of all his privileges and rights as a member, to give him regular standing in the organization, although its records show him to be in default, and the decree of his suspension to be unrevoked.

There are allegations in the complaint which claim that some of the members of the committee had prejudged the plaintiff's case; but in the protest which plaintiff served upon the committee, he does not place his refusal to submit or appear on any such ground. He makes no objection to the competency or fairness of the committee. He expressly assigns for his refusal, that no matters of difference have arisen between him and Currie, Martin & Co., and that they have no claim. If any such objections as he now mentions, existed, he should have asserted them at the proper time, so that appropriate action could be taken by the association of which he was a member.

The plaintiff also charges the officers, committees, and a portion of its members sufficient to control its action, with a disposition to deny him justice, and deprive him of his rights; but all the allegations on the subject are denied by the answer of the president.

This court, under its equitable powers, can give the plaintiff no relief under the facts disclosed. Plaintiff has unexhausted remedies for all his complaints and grievances, under the constitution and laws of the board. There is no occasion for the intervention of this court. When he became a member

he submitted to its laws, which afford full and complete relief. The equity of the complaint is denied.

Motion to dissolve injunction granted.

AMERICAN FLASK AND CAP COMPANY *against* SON.

Superior Court; Special Term, July, 1867.

MOTION TO VACATE ARREST.—EFFECT OF INSOLVENT'S DISCHARGE.

When a defendant against whom an order of arrest has been issued, moves to vacate it, upon the ground that an action on the debt alleged has been barred by a discharge in insolvency, granted under either of the statutes of New York, upon that subject, the Court has power to examine into the validity of the discharge.

The history of the legislation of the State on the subject of insolvent's discharges reviewed, and former decisions compared.

A discharge in insolvency granted under the laws of New York, is not rendered invalid by the fact that the petitioner omitted to give notice of the proceeding, to the creditor who impeaches the discharge; nor by the fact that he omitted to name such creditor in his schedule of creditors, unless a fraudulent purpose in such omissions is proved.

Motion to vacate an order of arrest.

The complaint in this action showed a cause of action for goods sold and delivered. On an affidavit charging fraud in contracting the debt, the plaintiff obtained an order of arrest, which the defendant now moved to vacate, on grounds which appear in the opinion.

B. F. Sawyer, for the motion.

Edward F. Browne, opposed.

JONES, J.—In Wright *v.* Ritterman (*Abb. Pr. R., N.S.*, 428)

it is held that a valid discharge granted under the provisions of article 5, ch. 5, title 1, part 2, of the *Rev. Stat.* (under which provisions the discharge in this case was granted) operated so as that if a person in whose favor such discharge has been granted should thereafter be sued in an action *ex contractu* for a debt due or contracted at the time of the application for a discharge and should be arrested on the ground that the debt was fraudulently contracted, such person would be entitled to be discharged from arrest."

In the present case the summons being issued under the 1st subdivision of section 129, shows that this action is brought for the recovery of money arising on contract; in other words it is an action *ex contractu* for the recovery of a debt. The defendant has been arrested on the ground of fraud in contracting the debt.

The affidavits on which the order of arrest was granted, show that the debt was contracted and due at the time the application for a discharge was made. The defendant is therefore entitled to be discharged unless the validity of his discharge can be inquired into on this motion, and on such inquiry it should be found to be invalid.

Sec. 21 of art. 7 of title 1 of ch. 5, part 2, of the *Rev. Stat.* provides: "If any insolvent discharged under the third, fourth, fifth or sixth articles of this title shall be arrested on mesne process, in a suit upon any debt or liability in which he is exempted from imprisonment, as in those articles declared, and shall apply to any officer to discharge him from arrest, said officer shall cause reasonable notice to be given to the plaintiff in such suit to show cause why such insolvent should not be discharged from such arrest.

Section 22 of said article provides: "The plaintiff in such suit may show as cause against such discharge any fraud committed by such insolvent in obtaining his discharge, or any cause for avoiding such discharge declared in the said articles, and such officer may require such insolvent to be held to bail in such process, as if no such discharge had been granted."

Under these sections it was clearly the duty of any officer or court to whom a defendant arrested on mesne process applied to be discharged from arrest, on the ground that he had

received a discharge under seme one of said four articles, to inquire whether such defendant had been guilty of any fraud in obtaining his discharge or whether any cause for avoiding such discharge, as declared in such articles, existed.

This was the view taken by the late Supreme Court of a similar provision in the act entitled "an act to abolish imprisonment for debt in certain cases" passed April 7, 1819 (*Laws of* 1819, 115, §3). The provision referred to is "and provided further that nothing herein contained shall prevent any court of record or any judge of said court from directing such debtor to be held to bail on mesne process, in cases of fraud under this act."

Under this provision the late Supreme Court, in a case where the defendant, having been arrested without any previous order, applied on motion to be discharged on common bail, refused to discharge him, because the affidavits read in opposition showed facts amounting to *prima facie* evidence of fraud in obtaining the discharge. (Reynolds *v.* Manning, 1 *Cow.*, 228.)

It will be observed that this case does not fall strictly within the letter of the act of 1819, as no previous direction to hold to bail had been obtained, but the court in accordance with the spirit of the act held that the plaintiff, having shown facts which precluded defendant from availing himself of his discharge, they would not afford him protection under it.

The authority of this case has never been questioned.

The provision of the act of 1819 did not apply to the act entitled "an act for giving relief in cases of insolvency, passed April, 1813 (*R. L.*, *p.* 460). Consequently the rule adopted in cases arising under that act that the validity of a discharge would not be inquired into on motion, but that the defendant would be discharged from arrest on the production of his certificate, did not apply to cases under the act of 1819.

This will be seen by comparison of the case of Reed *v.* Gordon (11 *Cow.*, 507), decided by the Supreme Court, May term, 1823, and the above case of Reynolds *v.* Manning, decided by the same court, but three months afterwards at August term, 1823.

The first case arose under the act of 1813, on defendant's motion for a discharge from arrest; plaintiff's counsel referred

to the above cited provision in the act of 1819, and argued that that provision showed the understanding of the legislature to be that a discharge from arrest, by reason of defendant having obtained an insolvent discharge, could not be granted on motion short of legislative provision. The court, however, held that it was settled by repeated decisions that neither fraud or irregularity in obtaining the discharge could be tried on affidavits, that want of jurisdiction was not distinguishable from fraud, that none of the proceedings before the discharge could be questioned in the summary mode of a motion, and discharged the defendant from arrest.

But three months later, their attention having in the above case, been called to the provision in the act of 1819, and that provision having been disregarded in that case as inapplicable, they, in Reynolds *v.* Manning, in a case arising under the act of 1819, refused to discharge the defendant on motion because the affidavit showed *prima facie* that there was fraud in procuring the discharge.

This distinction between the two classes of cases depended on the existence in one act of a provision which was not contained in the other, and this distinction has been constantly acted on. Thus we find that all the cases in the late Supreme Court, in which it was held the validity of a discharge would not be inquired into on motion, were cases arising under the act of 1813, as it stood prior to the revision of the statutes.

The adoption of the revised statutes in 1828 abolished this distinction, for by them sections 21 and 22 of article 7, which are substantially, so far as this question is concerned, the same as the provision in the act of 1819, were made applicable to discharges under the two-third act and consequently the rule adopted (if any authority is to be followed on the subject) by the late Supreme Court in reference to discharges under the act of 1819 must now be adopted in the case of all discharges, under said 3d, 4th, 5th and 6th articles.

It is true, since the passage of the Revised Statutes, several cases have been decided holding that the validity of a discharge under the two-third act cannot be inquired into on motion to discharge from arrest. Among other cases is that of Russel, *et al, v.* Packard (9 *Wend.*, 431). But on examination of

these cases it will be seen that sections 21 and 22 of article 7 were overlooked by the court.

This brings me to the inquiry as to whether the discharge is invalid.

It is claimed to be invalid for two reasons, firstly, because no notice of the proceedings was given to the plaintiffs, and secondly, because the plaintiffs' debt is not mentioned in the schedule of creditors.

By reference to the statute under which the proceedings were had, it will be seen that no notice is required to be given to creditors other than by publishing in a newspaper a notice of the contents of an order theretofore to be made by the officer before whom the proceedings are pending, requiring the creditors of the insolvent to show cause before such officer, at a certain time and place, why the prayer of the petitioner should not be granted. Such an order was made in this case, and a notice of the contents thereof duly published. The names of the creditors are not required to be inserted in the notice; all that is necessary is to direct the notice:

"To the creditors of an insolvent debtor."

It follows that plaintiffs had as ample notice as if they had been named in the schedule of creditors, and as full notice as the creditors named in the schedule, and had all the notice the law requires.

The bare omission of plaintiffs' name from the schedule of creditors is not sufficient to invalidate the discharge. To have that effect such omission must be fraudulent.

This was held in relation to proceedings under the two-third act (Aynes *v.* Scriber, 17 *Wend.*, 407; Small *v.* Graves, 7 *Barb.*, 577).

Such being the law under that act where it is necessary to confer jurisdiction that two-thirds of the creditors should petition, and where, consequently, the omission of a single debt might be sufficient to constitute the petitioning creditors two-thirds of all the creditors named in the schedule when otherwise they would not be with much greater reason should it be held to be law under the act in question when it is unnecessary that any creditor should petition.

Under the two-third act one might well conceive how a

fraud could be perpetrated by the omission of a single debt; such omission might be absolutely necessary in order to make it appear to the officer that two-thirds of the creditors were petitioners. Yet the Court held that, notwithstanding, this might be the result of such omission, still the bare omission was not, even when connected with such result, necessarily fraudulent. No such object, however, could be imputed to an omission of a creditor under the act in question since none of the creditors are required to join the petition.

It is difficult to perceive how the omission in question could have been fraudulent. For what fraudulent purpose was it omitted?

It was not necessary to omit it to give the officer jurisdiction. It was not necessary to omit it so as to avoid giving notice of the proceedings to the plaintiffs, because all the notice necessary to be given was published in a newspaper directed to the creditors generally, and through this means plaintiffs would obtain notice as well without being named as creditors in the schedule, as with being so named.

It may be urged that he intentionally omitted the debt so as to avoid recognizing it as his debt. But it was not necessary to omit it for that purpose; he might have inserted it with a memorandum attached stating it to be a debt due by his wife, but claimed by his creditors to be a debt of his own contracting, which claim he denied. In that case there would be no acknowledgment of it as a debt of his own.

But again being insolvent at the time of his application for a discharge, the addition to his creditors of plaintiffs small debt of $210 would not have materially affected his financial condition. If then he had reason to suppose himself liable for it, he could have no objection to recognize it. It is an universal rule of law to put such a construction on the acts and conduct of men as will comport rather with innocence than guilt.

I am unable to perceive any fraudulent object to be obtained in this case by the omission of the debt in question; its omission must therefore be ascribed to some cause innocent in its character.

Such cause may be defendant's belief that under the act of 1860, he was not liable for goods purchased by him in the

name of and for his wife as her agent, for the separate business carried on by her.

I see nothing indicating that such was not his belief; on the contrary, all the indications tend to show that such was his honest and sincere belief. His belief may be erroneous; but the question of fraudulent intent in omitting the debt depends not on the fact whether it is a valid legal claim or not, but on the defendant's reasonable belief as to whether it was a debt due by him.

I have come to the conclusion that the discharge is valid.

If then the debt in question is one for which defendant is liable, he is by his discharge exempted from imprisonment.

If he is not liable for the debt, then, of course, he is not liable to arrest.

Order of arrest vacated.

COOKE *against* THE STATE NATIONAL BANK OF BOSTON.

Supreme Court, First District; Special Term, December, 1867.

SUING NATIONAL BANKS.—FOREIGN CORPORATION.

National Banks doing business in one State are not, as such, exempt from liability to be sued in the courts of another State.

A national bank is a "foreign corporation" within the meaning of that term as defined in section 227 of the Code of Procedure; and its property in this State is liable to be attached in an action against it, to the same extent as that of foreign corporations generally. *So held* where the bank was organized and located in another State.

Motion to vacate an attachment.

The defendants in this action were incorporated under the act of Congress authorizing the creation of National Banks,

and were located in Boston, Massachusetts, as their place of business. An attachment having been issued against them, under the provisions of the Code of Procedure allowing suits to be commenced by attachment against foreign corporations, they now moved to set it aside.

William F. Allen, for the motion.

John E. Burrill, opposed.

INGRAHAM, J.—Two questions have been submitted on this motion, viz.: Whether the National Banks created under the act of Congress can be sued in a State court out of the county or city in which the bank is located; and whether such a corporation is a foreign corporation within the meaning of the laws of the State of New York..

The first question arises under section 57 of the act of Congress of June 3, 1864, authorizing the creation of National Banks, which enacts "that suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which such association may be established." By section 8 it is declared that such corporation may "sue and be sued, complain and defend in any court of law or equity as fully as natural persons." It is contended on behalf of the defendants that these corporations, being financial agents of the government, cannot be sued in State tribunals, except so far as the act of Congress permits. Even admitting the correctness of this rule as contended for by the defendant's counsel, there are two answers to it in the present case. One is that there is nothing in the papers on which this motion is founded to show that this bank is, or ever has been, a financial agent of the government. It by no means follows that because the bank, if so employed, would be exempt from such actions while so acting, that it would be so exempt if never employed to act for the United States. Nor does the receipt of their bills by the United States, in payment of taxes and other payments, operate to create any such exemption; any more than a pro-

vision authorizing the receipt of notes of State banks for such purposes would extend to them such exemption. In the second place, section 8 above cited shows the intent to be that these banks may sue and be sued as fully in any court of law or equity as natural persons might maintain actions. This provision would remove all difficulty on this question unless the provisions of section 57 shall be considered as controlling and modifying the provisions of section 8. I do not give so extended a construction to this section. It is true where the provisions of the statute mean to impose a duty, there the use of the word "may" is to be understood as imperative, but in other cases it is merely discretionary. No duty or obligation is included in this provision. In many cases, actions against the bank could not, without this provision, have been maintained in the courts of the United States. The difference in the use of language in the same section shows that the legislative power used the word "shall," where it was intended to make the limitation imperative, in limiting proceedings to enjoin the comptroller to actions in the courts of the United States. Such a construction would enable a bank located in one State, by removing its funds to another, to place them beyond the reach of any action that could be brought against the corporation.

The second question is whether a National Bank, organized under the act of Congress, is a foreign corporation within the meaning of our statutes. By the Code a foreign corporation is defined to be a corporation created by or under the laws of any other State, government or country. (*Code of Pro.*, § 227). The word "other," as there used, means any other State or government than that of this State. In a case lately decided in another district, it has been held that a bank, organized under this act and doing business in this State, is still to be considered a foreign corporation and subject to the proceedings by way of attachment. I think there can be no doubt on this question where the corporation is located in another State, and is foreign both in its origin and its location.

The motion to vacate the attachment is denied with costs.

JOHNSTON *against* GREEN.

New York Common Pleas; Special Term, December, 1867.

SERVICE OF ORDER.—INQUEST.

An order placing a cause on the special calendar of short causes for trial, must be served on the adverse party, before the cause can be brought to trial under it. If service is omitted, an inquest taken under the order is irregular, and will be set aside on motion.

Motion to set aside an inquest taken on a day assigned for the hearing of "short causes."

The action was on a promissory note. The defendant Green answered, and made and filed an affidavit of merits to prevent an inquest. On the seventh day of December the plaintiff served on defendant's attorney a notice of motion, for the eleventh, to place the cause on the special calender for the trial of short causes under the rules of the court.

On this motion the defendant did not appear, and the plaintiff took an order by default, placing the cause on the special calender for trial for the last Friday of the term. On that day the plaintiff took an *inquest* against the defendant Green, no one appearing on his behalf. Judgment was entered and execution issued to the sheriff of the city and county of New York. No service of the order, placing the cause on the special calendar for short causes, was made.

The defendant now applied to set aside the judgment and execution on the ground of irregularity.

J. C. Dimmick, for the motion.

W. C. Horn, opposed.

VAN VORST, J.—It is the duty of an attorney obtaining an order in an action to serve a copy of it on the opposite attor-

ney, in all cases where the rights of the other party may be affected or prejudiced by any proceedings taken under the order. Until the order has been served no active proceedings can be taken under it.

An attorney conducting a cause has the right to manage it according to the *general* rules and practice of the court without reference to any order which may be obtained, interfering with his client, or the ordinary conduct of the cause, until a party obtaining an order against him serves a copy of it, so as to give him an opportunity to prepare to meet the exigencies of the order.

This is especially true with regard to orders obtained by default. (Jackson *v.* Wilson, 9 *Johns. R.*, 265; Jackson *v.* Johnson, 7 *Cai. R.*, 419; *Burrill's Practice*, 338.)

Motion granted; judgment and execution set aside.

PARKER *against* RAYMOND.

Supreme Court, First District; Special Term, November, 1867.

LIBEL.—SUFFICIENCY OF COMPLAINT.

It is not a sufficient ground of demurrer to a complaint for libel that the article complained of does not name the plaintiff.

Where the person intended by the libelous matter is not named, or is ambiguously mentioned, the proper facts may be averred and proved to show that the plaintiff was the person intended.

Upon such facts being proved, the question whether the plaintiff was the person intended by the article, is a question of fact for the jury. A complaint, in such a case, is sufficient on demurrer, if it contains averments sufficiently certain to enable the jury to determine this question.

Demurrer to a complaint.

The action was brought by the plaintiff, a conductor upon the New Jersey Railroad, against the defendants, proprietors of the *New York Times*, to recover damages for an alleged libel.

The article complained of, was an account of an accident upon the New Jersey Railroad, in which one Dwight was killed. Its general tenor is stated in the opinion. The defendants demurred, on the ground the complaint did not state facts sufficient to constitute a cause of action.

Amos G. Hull, for the demurrer.

CLERKE, J.—The only question arising on the demurrer is, whether the complaint contains an averment sufficiently certain to enable a jury to determine whether the alleged libel was intended to apply to the plaintiff. No name is mentioned; but the New Jersey Railroad is specifically mentioned; its management, in certain respects, severely condemned. And it is alleged that, after the accident which had befallen Mr. Dwight, a man came into the cars where his daughter was striving to get out to attend upon her father; that this man seemed to be a conductor, and in the roughest manner asked who checked the engineer; that he turned to her and said: "D—n you, do you mean to get off? I'll go on if you don't step quick;"—and that, after a question put by her, he went on cursing and ordering her off.

It is clear that, by this statement, some individual is meant. No doubt the conduct of the company is severely condemned in a previous part of the article; but some individual in their employment, or who represented himself to be in their employment, is held up also for public animadversion. If, therefore, the complaint is so free from ambiguity as that a jury can say that the individual referred to is the plaintiff, I think the action can be maintained. The company may have their redress if they have been libeled. Their conductor is also entitled to redress if he has been libeled.

It is now well established, that where libelous matter is charged against some particular person, either not named or who is so ambiguously described that the person meant

cannot be identified without the aid of extrinsic facts—in such a case, by the introduction of proper averment and a *colloquium*, the words taken in connection with the whole libel may be rendered sufficiently certain to support the action. It will then be proper to permit the whole to go the jury to determine, as a question of fact, whether by the person mentioned in the alleged libel the plaintiff was intended. (See Van Vechten *v.* Hopkins, 5 *Johns.*, 211.) In this case, as I have said, some person is accused of improper, and, indeed, cruel, heartless conduct; and the jury must decide whether that individual is or is not the plaintiff.

Demurrer overruled, with costs, with liberty to the defendant to answer in twenty days on payment of costs

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McLAREN *against* McMARTIN.

Court of Appeals, January, 1867

STATUTE OF LIMITATIONS.—NEW PROMISE.

An indorsement made upon a note, by the payee, admitting receipt of part payment, is not sufficient, by itself, to prove a part payment for the purpose of removing the bar of the statute of limitations, and enabling the payee to maintain an action for the balance. When so offered, the indorsement must be regarded as a mere declaration, by the payee, in his own favor.

A demand which has already been outlawed at the death of the original debtor, cannot be revived by a part payment made by his administrator. If an administrator has power to revive such a demand at all, without the consent of those interested in the estate, it can only be done by his express promise to pay.

Appeal from a judgment of the Supreme Court.

The action was brought by Peter McLaren, against Martin McMartin, as the administrator of Daniel McMartin, Jr., upon

a promissory note for $100, made by Daniel. The note was made April 19, 1835, and was drawn payable one year from date. The action was commenced September 23d, 1854; eighteen years after the maturity of the note, and seven years after the death of the maker and the appointment of the defendant as his administrator.

To meet the defence of the statute of limitations, the plaintiff relied upon partial payments. Two such payments were alleged to have been made by the maker in his lifetime; these were denied by the answer. A third was alleged to have been made by the administrator on March 3, 1848. This allegation was admitted by the answer.

On the trial the note was produced, and bore indorsements, in the handwriting of the *payee*, admitting receipt of partial payments at dates during the maker's lifetime. No other proof was offered that such payments were in fact made.

The note also bore an indorsement: "March 3, 1848. Received fifty dollars on the within, by the hands of Martin McMartin." In addition to this evidence of the payment, the son of the plaintiff testified to such payment having been actually made; but that the payment and the indorsement were made on March, 3, 1849, instead of 1848, as erroneously stated in the indorsement.

The justice before whom the cause was tried, upon these facts directed a verdict for the plaintiffs, subject to the opinion of the court at general term. The plaintiff moved at general term in the Fourth District for judgment; but the court ordered judgment for defendant; from which the plaintiff now appealed.

A. McFarlan, for the appellant.

M. McMartin, for the respondent.

PORTER, J.—The demand, for the recovery of which the action was brought, was extinguished on April 12, 1842. It was neither continued nor revived by any act or admission of the maker. The indorsements written by the payee were mere declarations in his own favor, wholly unsustained by the proof. The fact that they were shown to the defendant, after

the death of the maker, does not change their nature, nor impart to them the force of legal evidence. The underwritten indorsement proves the fact it states, but nothing as to antecedent payments or indorsements.

If, then, the extinguished demand was ever revived, it was by the act of the administrator, two years after the death of the maker, and seven years after the claim was barred. The statute of limitations having attached before the enactment of the Code, the contract could not be reinstated by any subsequent acknowledgment or promise, unless "contained in some writing signed by the party to be charged thereby." (*Code*, § 110; Esselstyn *v.* Weeks, 2 *Kern.*, 635.)

The indorsement relied on by the appellant is in these words: "March 3d, 1848, received fifty dollars on the within, by the hands of Martin McMartin." It does not constitute a new contract, either in form or in legal effect. It is precisely what it purports to be, a statement in his handwriting, of the fact, the date and the amount of payment, and the name of the person from whom it was received. It proves this, and nothing more. It is not signed by the administrator; it contains no undertaking in behalf of the estate, and it neither affirms nor denies the existence of facts of which he had no personal knowledge. The indorsement shows precisely what the pleadings admit, that this payment was made by the defendant; and the debt was not thereby revived, unless such payment was sufficient to revive it. The proof corrects the error in the date, and shows that the indorsement was in fact made a year after it purports to have been written.

The Code provides that the section above referred to shall not alter the effect of any payment of principal or interest. (*Code*, § 110.) The appellant erroneously assumes, that, under the antecedent rules of law, the effect of a partial payment by an administrator was to revive a demand extinguished in the lifetime of the intestate. Payment by the debtor personally, or by his direction and authority, is evidence now, as heretofore, from which an acknowledgment of the residue of the debt may be implied. It does not, however, even in that case, constitute an express promise, nor amount, *per se*, to a revival; but it is evidence from which an intention to renew the original

promise may be inferred. (Shoemaker *v.* Benedict, 1 *Kern.*, 185.) So, in the case of a demand existing at the death of the intestate, and which the administrator is bound to pay, it would be legitimate to infer, from a subsequent partial payment, an acknowledgment of his continuing the obligation.

But, in respect to demands barred at the death of the intestate, the administrator is under no such obligation. The immunity of the estate is absolute. His position is purely fiduciary. It is his right and his duty to apply the funds in his hands to the satisfaction of all legal demands; but he has no retrospective authority to contract debts in the name of the intestate, or to revive those which were extinguished by law in his lifetime. There is a moral obligation on the debtor to pay demands which he knows have never been satisfied; but there is none on his executor or administrator to pay claims which the statute has barred. He is not at liberty to misapply assets which the law awards to the creditors and next of kin.

It has been questioned by eminent jurists, in this country as well as in England, whether a demand barred by the statute can be revived, even by an expressed promise of the personal representative, unless with the consent of those interested in the estate; and it is well settled that, without an express promise, there can be no revival, by an executor or administrator, of a debt extinguished in the lifetime of the decedent. This is the only mode in which he can give to the holder of an outlawed demand against the estate the *status* of a legal creditor in the courts; if, indeed, it can be given in that mode, within the principles settled by the more recent decisions. There was no such express promise in this case, and the defendant was therefore entitled to judgment. (Tullock *v.* Dunn, *Ry. & M.*, 416; Thompson *v.* Peter, 12 *Wheat.*, 565; Bloodgood *v.* Bruen, 4 *Seld.*, 362, 369.) In Bloodgood *v.* Bruen, Judge GARDINER, in delivering the opinion of the court, said: "But if we assume, with the court below, that Bruen, as executor of the estate of T. H. Smith, admitted this demand, an admission in that character cannot, it seems to me, in the nature of the case, amount to a contract which will bind the estate of the testator. It is no part of the duty of an executor

to subject the estate of his testator to a demand from which it was by law exempt. If he can do it in any manner, it must, at all events, be by a positive contract. It has accordingly been held, even in England, that there must be an express promise, and that all the executors must unite in it."

The doctrine which at one time prevailed, that an outlawed demand might be revived by a partial payment, not made by the immediate debtor, but by a joint contractor, an assignee or a trustee, is no longer recognized in our courts. (Roosevelt *v.* Mark, 6 *Johns. Ch.*, 267, 292; Pickett *v.* King, 34 *Barb.*, 193; Bloodgood *v.* Bruen, 4 *Seld.*, 362; Shoemaker *v.* Benedict, 1 *Kern.*, 176, 185; Winchell *v.* Hicks, 18 *N. Y.*, 558; Pickett *v.* Leonard, 34 *Id.*, 175.)

It follows, from these views, that the indorsement in the handwriting of the defendant should be treated as the mere statement of the fact of payment, by one who had no authority in this form to bind the estate; and that, even if it had been authenticated by his signature in his representative capacity, it would have proved nothing but the making of such payment, and would have amounted neither to a renewal of the note, nor to an express promise to pay the residue of a claim, which did not constitute a legal debt of the intestate.

The judgment of the Supreme Court should be affirmed

All the judges concurred in the foregoing opinion, except that GROVER, J., read an opinion for reversal, in which HUNT, J., concurred.

Judgment affirmed.

WHITNEY *against* WHITNEY.

Supreme Court, Third District; General Term, March, 1867.

WIFE'S SEPARATE PROPERTY.—SUIT AGAINST HUSBAND.

An action may be maintained by a wife against her husband, to recover for wrongfully taking and converting to his own use, money which was the separate property of the wife.

In such action the complaint is not open to objection because it demands judgment for the sum of money alleged to have been converted. A prayer for an accounting is not only form of relief allowable.

Appeal from judgment on a demurrer to a complaint.

The action was brought by Cornelia E. Whitney against her husband, Hampden Whitney, and was founded upon facts which are stated in the opinions given below.

The defendant demurred to the complaint, contending that a wife could not maintain such an action against her husband. The demurrer was argued before Justice INGALLS, at Rensselaer special term, November, 1866, who overruled it; rendering the following opinion:

INGALLS, J.—The demurrer to the complaint admits the material allegations of the complaint. The facts thus admitted are that on the first day of April, 1866, the plaintiff was possessed in her own right of $618 50 which was in her pocket-book, and placed under her pillow, and was, without her consent, taken by her husband, who refused to surrender the same to her upon demand. This action is instituted to recover the same. The only question presented is whether the action can be maintained against the defendant, who was, at the time the money was taken, and still is, the husband of the plaintiff.

It is clear that a common law action could not have been sustained previous to the act of the legislature concerning the

rights and liabilities of husband and wife, passed April 10, 1862. A court of equity not unfrequently interposed to protect the rights of married women in regard to their separate property. The seventh section of the act of March 20, 1860, as amended by section 3 of the act of 1862, provides:

"Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase or the gift or grant of any person in the same manner as if she were sole." This statute expressly declares that a married woman may sue and be sued in regard to her separate property the same as if she were sole. Language more explicit could not be employed to declare the apparent intention of the legislature. The effect of modern legislation has been to confer upon married women rights and immunities in regard to their separate property which at common law they did not possess, particularly in regard to the manner of enjoying and controling the same.

Several cases have been cited to the effect that a married woman cannot maintain an action against her husband for slander, &c.; but the disposition of this case does not necessarily involve the question presented by that class of cases. Here the action is in relation to the separate property of the plaintiff, which is the subject expressly referred to by the statute of 1862, and in regard to which the married woman may sue and be sued. By the common law the husband, by virtue of the marital relation, succeeded to the ownership of the personal property of the wife and was authorized to reduce the same to possession and to retain the same. Legislation has to a great extent divested the husband of such right, and placed the property under the direct control of the wife. The act of 1862 provides a remedy for any violation of the rights of a married woman in respect to her separate property. As the legislature has thus conferred upon married women the right to receive and hold property free from the control of the husband; and the act of 1862 has provided a remedy by which such right is to be protected and enforced, viz: by action in her own name the same as though sole; I am of opinion that the present action can be maintained by the plaintiff. This view

harmonizes the remedy with the right, and carries out the obvious intention of the Legislature. With the policy of such an innovation the courts have nothing to do. The legislature possesses the power to enact such laws, and it is the duty of the courts to enforce them in good faith.

It is contended by the plaintiff's counsel that the complaint is in equity, and therefore the demurrer cannot be sustained. Whatever force there may be in this position, I prefer to put the decision upon the ground that the action can be sustained under the act of 1862, without regard to the consideration whether the action is to be regarded as in equity or otherwise.

The plaintiff must have judgment upon the demurrer, with leave to the defendant to answer in twenty days on payment of costs of the demurrer.

The defendant now appealed to the general term.

J. Wagner, for the appellant.

Beach & Smith, for the respondent.

*By the Court.**—MILLER, J.—The plaintiff's complaint in this action sets forth with some particularity the nature of the plaintiff's claim and its origin. It appears thereby that the plaintiff was the owner of considerable property, part and most of which consisted of a house and lot which had been exchanged for another parcel of real estate. That she sold the house and lot, and that a portion of the avails of the sale, in bank bills, was placed by her, on retiring to bed at night, in a pocket-book, under her pillow, and was taken from there by the defendant, before she arose on the following morning, and disposed of and converted to his use. She asks judgment for the amount thus taken, against the defendant. It will be seen that the complaint is not in the ordinary form of a complaint in an action of trover for the conversion of personal property, but is drawn to conform to the facts as they are alleged to exist.

* Present—PECKHAM, MILLER and HOGEBOOM, JJ.

I am inclined to think that the action can be maintained in the form in which it is presented in the pleadings. At common law the wife could not maintain a civil action against her husband, but in equity she could maintain an action against her husband for the protection of her property and to restrain him from its improper use and destruction. (Freethy *v.* Freethy, 42 *Barb.*, 641.) He was also liable to account to her for her separate estate received by him without her knowledge; and equity would interfere to protect her in the enjoyment of it. (*Clancy, Rights of Marr. Wom.*, 35; Devin *v.* Devin, 17 *How. Pr.*, 514.)

If, before the Code was enacted, the defendant had appropriated his wife's property without her knowlege or consent, or if he had threatened its destruction, or injury to it, there cannot, I think, be any doubt but what he would be liable to a suit in equity to compel him to return it, or to prevent his improper interference with it. Now, by the Code, the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished. There is to be but one form of action for the enforcement and protection of private rights and for the redress of private wrongs. (*Code*, § 69.) The remedies, therefore, heretofore sought in a court of equity, are now only to be obtained by the ordinary forms of proceedings according to the established practice of the court. By that practice all forms of pleading previously existing were abolished. (*Code*, § 140.) And it was provided that the complaint should contain a statement of the facts constituting the cause of action, and a demand of the relief to which the party claimed to be entitled. (*Code*, § 142.)

In the case under consideration the facts are stated as they are supposed to exist, and I do not discover but that they are presented in conformity with the provisions cited, and the design and intentions of the law makers to simplify pleadings so as to present briefly a concise statement of the case.

The only objection which it seems to me can be urged with any appearance of being well founded, against the complaint is, that a money judgment is demanded. Is there any foundation for this objection? The money was actually taken, and the plaintiff seeks to recover it back. If the circumstances alleged

are established upon a trial, the judgment of the court should be that the money be refunded, or that the plaintiff have judgment for the amount.

If the prayer for relief had been for an accounting, then the decree would have been that the defendant pay over the money, if the plaintiff was successful; so, in reality, it makes no sort of difference. Whatever the prayer for relief may be, the judgment of the court will be according to the facts alleged and proved. And even if the party err in the nature of the relief demanded, the court will grant it according to the facts proved. (Emory *v.* Pease, 20 *N. Y.*, 62; Dwight *v.* Newton, 10 *Id.*, 51; Denman *v.* Prince, 40 *Barb.*, 219.) I think, at common law, this action was maintainable in equity, and as the Code has abolished the distinction between equitable actions and actions at law, and the old forms of pleadings, that a case is presented in the plaintiff's complaint which makes out a good cause of action. The complaint therefore is not demurrable.

If I am correct in the views which I have expressed, then it is not necessary to examine the question whether the action can be maintained under the act of 1862. The order of the special term should be affirmed and judgment rendered for plaintiff on the demurrer, with leave to the defendant to answer on payment of costs.

PECKHAM, J., concurred in the result.

HOGEBOOM, J., dissented.

Judgment affirmed.

TREVOR *against* WOOD.

Court of Appeals; January, 1867.

SERVICE OF NOTICE BY TELEGRAPH.—SUBSCRIPTION UNDER STATUTE OF FRAUDS.

When an offer is made by telegraph, acceptance of it is completed by despatching a notice that it is accepted, by the telegraph; and the parties are bound by the engagement from that time. *So held* in a case where the parties had previously agreed on the telegraph as a medium of business communication.

The fact that delivery of the message is delayed (without privity of the party sending the message), and that the party to whom it is sent, during the delay telegraphs a revocation, is not enough to exonerate him from the obligation to perform the agreement.

Appeal from a judgment of the Supreme Court in the First District.

The action was brought by John B. Trevor, jr., and James B. Colgate against John and George W. Wood, and James Cullen.

The plaintiffs were dealers in bullion in New York, and the defendants dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

On January 30, 1860, the plaintiffs telegraphed from New York, to the defendants at New Orleans, asking at what price they would sell one hundred thousand Mexican dollars. On the 31st of the same month the defendants answered that they would deliver fifty thousand at seven and one-fourth, and on the same day the plaintiffs telegraphed from New York, to the defendants at New Orleans, as follows:

"To JOHN WOOD & Co.: Your offer fifty thousand Mexicans at seven and one-quarter accepted; send more, if you can.

"TREVOR & COLGATE."

At the same time the plaintiffs sent by mail to the defendants, a letter acknowledging the receipt of the defendant's telegram, and copying the plaintiff's telegraphic answer. On the same day the defendants had also sent by mail a letter to the plaintiffs copying defendants' telegram of that date. On the next day, February 1, 1860, the plaintiffs again telegraphed to the respondents, as follows:

"To JOHN WOOD & Co.: Accepted by telegraph yesterday your offer for fifty thousand Mexicans; send as many more, same price. Reply. "TREVOR & COLGATE."

This telegram, as well as that of 31st of January, from the plaintiffs, did not reach the defendants until 10 A.M., on February 4, 1860, in consequence of some derangement in a part of the line used by the plaintiffs, but which was not known to the plaintiffs until February 4, when the telegraph company reported the line down.

On February 3, the defendants telegraphed to the plaintiffs as follows: "No answer to our despatch—dollars are sold;" and on the same day they wrote by mail to the same effect. The plaintiffs received this despatch on the same day, and answered it on the same day, as follows: "To John Wood & Co.: Your offer was accepted on receipt;" and again, the next day: "The dollars must come, or we will hold you responsible. Reply. Trevor & Colgate;" and again on February 4, insisting on the dollars being sent "by this or next steamer," and saying: "Don't fail to send the dollars at any price." On the same February 4, the defendants telegraphed to the plaintiffs: "No dollars to be had. We may ship by steamer, twelfth, as you proposed, if we have them."

No dollars were sent, and this action was brought to recover damages for the alleged breach of contract in not delivering them.

The referee found for plaintiff $219 33.

Judgment entered upon his report was revised by the court at general term; and from the judgment of reversal the plaintiffs now appealed.

SCRUGHAM, J.—The offer of the respondents was made on the

31st January, and they did not attempt to revoke it until the 3d of February. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case is, whether a contract was created by this acceptance, before knowledge of it reached the respondents.

The case of Mactier *v.* Frith, in the late court of errors (6 *Wend.*, 103) settles this precise question, and was so regarded by this court in Vassar *v.* Camp (1 *Kern.*, 441), where it is said that the principle established in the case of Mactier *v.* Frith was, "that it was only necessary that there should be a concurrence of the minds of the parties upon a distinct proposal, manifested by an overt act; that the sending of a letter announcing a consent to the proposal was a sufficient manifestation, and consummated the contract from the time it was sent."

There is nothing in either the case of Mactier *v.* Frith, nor in that of Vassar *v.* Camp indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office; and in fact, the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposal is regarded as an acceptance, because it is an overt act, clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, and thus making that "*aggregatio mentium*" which is necessary to constitute a contract.

Mr. Justice MARCY, in delivering the leading opinion in Mactier *v.* Frith says: "What shall constitute an acceptance will depend, in great measure, upon circumstances. The mere determination of the mind, unacted on, can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence, under certain circumstances,

is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated; or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract."

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies.

In accordance with this agreement, the offer was made by telegraph to the appellants in New York; and the acceptance, addressed to the respondents in New Orleans, was immediately dispatched from New York, by order of the appellants.

It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them, as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication, the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches.

The referee finds as a fact that the respondents answered the telegram of the appellants, asking at what price they would sell 100,000 Mexican dollars, by another telegram, as follows, viz.:

"Trevor & Colgate, New York: Will deliver fifty thousand at seven and one-quarter, per 'Moses Taylor.' Answer.

John Wood & Co."

It was proved on the trial that this telegram was sent by the

respondents; and a letter of the same date, signed by them, repeating the telegram and stating that they had sent it, was read in evidence.

This affords sufficient evidence of subscription by the respondents to take the case out of the statute of frauds.

The judgment should be reversed.

All the judges concurred; except that BOCKES and GROVER, JJ.. concurred only in the result.

Judgment reversed.

UNION NATIONAL BANK OF TROY *against* BASSETT.

Supreme Court, Third District; General Term, March, 1867.

AMENDING PLEADINGS.—DEFENCE OF USURY.

The Court has power, under Section 173 of the Code of Procedure, to permit a defendant to amend his answer by setting up the defence of usury; although the original answer did not allege it.

It seems that the decision of the Court at Special Term, upon such a motion, although involving the exercise of discretion, is reviewable upon appeal to the General Term.

Appeal from an order of the special term allowing the defendant to amend his answer so as to set up the defence of usury.

The cause was tried before Mr. HENRY HOGEBOOM, as referee. On the trial, June 25, 1866, there was testimony introduced which showed that the note was usurious. The reference was adjourned to July 30, when further testimony was introduced by the plaintiffs. At the close of the testimony the defendant's attorney moved to amend his answer, so as to

let in the defence of usury, and asked that the answer should be conformed to the evidence, so that this defence would be available. By consent, the motion was then made before the referee, acting as a judge at special term, to amend the answer as was desired. The motion was granted on terms; the defendant to pay ten dollars costs of opposing motion, and one-half of referee's fees; the plaintiff to discontinue without costs, if he elected to do so within twenty days after order entered, and notice thereof to the plaintiff's attorney.

The plaintiffs appealed from this order to the general term.

C. F. Tabor, for appellants.

C. P. Collier, for respondents.

By the Court. *—MILLER, J.—I think that there was no such laches on the part of the defendant in making the motion, as would authorize a denial of it for that reason. The first knowledge which the defendant obtained as to the alleged usury was on the 25th of June. He could not have made his motion sooner than the special term which was held July 30, following. It actually was made on the 6th of August, very soon afterwards, and I think this was in season.

The power of the court to allow the answer proposed, if it exists at all, is conferred by section 173 of the Code. As originally enacted it did not contain the clause "by inserting other allegations material to the case." This amendment was, no doubt, made with a view of extending its operation and of giving it more scope. I think it was designed to embrace not only the issue joined between the parties, but anything relating to the controversy between them. Its object was, no doubt, to afford an opportunity when an error had occurred or a mistake been made, to remedy the difficulty and to redress the injury which might accrue by reason of it. An ignorant attorney might omit or neglect to interpose an answer which was essential to present the defence of a party, or overlook an important defence, or a party to the suit, as in this case, who

* Present—PECKHAM, MILLER and HOGEBOOM, JJ.

had derived no benefit from the liability incurred, may have discovered after the pleadings were in, perhaps upon the trial, some new facts, which would be a complete defence to the action, and which, at the time when the answer was served, were entirely unknown. Against such errors or mistakes the amendment was designed to provide a remedy. Suppose a demand had been paid, and the defendant prosecuted had no knowledge of the fact, should he be precluded upon discovering it afterwards, because it was not interposed originally? The same remark would apply to the defence now claimed to exist, as well as other defences, which would be legitimate. The statute when it speaks of the "case," means, I think, the whole thing, the subject matter of the litigation, and not merely that which is covered by the pleadings. It was intended to prevent any undue advantage by enlarging the technical rules applicable to the amendment of pleadings (which sometimes had operated oppressively), so as to promote the ends of justice and guard and protect the rights of parties. This construction is in conformity with the liberal spirit of the Code, and is sustained by the concluding paragraph of the section referred to, which only allows an amendment of pleadings at the close of the evidence upon the trial when it does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

These general views are also supported, I think, by almost a uniform current of authority. In Beardsley *v.* Stover (7 *How.*, 294), HARRIS J. says: "I understand the Court to be invested with the power, in its discretion, to allow any allegation material to the case to be inserted in the pleading, even though the offer may be to change the cause of action or defence." Again, in the Troy and B. R. R. Co. *v.* Tibbits (11 *How.*, 170), he reiterates the same doctrine. Numerous other authorities, some of them general term decisions, sustain this interpretation of section 173. (Union Bank *v.* Mott, 19 *How.*, 267; Van Ness *v.* Bush, 22 *How.*, 481; Harrington *v.* Slade, 22 *Barb.*, 161; Secor *v.* Law, 9 *Bosw.*, 163; N. Y. Ice Co. *v.* N. W. Ins. Co., 23 *N. Y.* 357.)

The only case to which we have been referred, which conflicts with the authorities cited, is the decision of the general

term of the Supreme Court of New York in the case of Woodruff *v.* Dickie (31 *How.* 164). With all due respect to that tribunal, I cannot but think that the view taken of section 173 in the able opinion in that case, is too narrow and restricted; and, as I have attempted to demonstrate, is not in conformity with the liberal system of pleading which the code of procedure has inaugurated.

I am also inclined to think that the order of the special term, although the motion called for the exercise of discretion, can be reviewed upon appeal. (See Union Bank *v.* Mott, 19 *How.*, 267.)

Assuming that it is reviewable, the question arises whether the amendment was granted in "furtherance of justice," within the meaning of section 173 of the Code. The answer allowed embraced the defence of usury. I think that this defence must rest upon the same grounds as any other, and that no distinction should be made in defences, provided a proper case is established. The courts, in the earlier cases especially, have held that, after plea pleaded, an answer or pleading setting up usury, or the statute of limitations, should not be allowed. (Wolcott *v.* McFarlan, 6 *Hill.*, 227; Lovett *v.* Cowman, 6 *Hill.*, 223; Sagory *v.* The N. Y. and N. H. R. R. Co., 21 *How.*, 455. Later decisions, however, tend to allow all defences to stand on the same level and without discrimination. In Catlin *v.* Gunter (1 *Kern.*, 375), where a question arose upon the trial as to a variance between the proof and the pleading, the court say: "We are not warranted in applying a different rule to the defence of usury, from that which we would hold applicable in other cases. It is a defence allowed and provided by law. The law has not made any distinction between such defences and those where no forfeiture is involved, and the court can make none." (See, also, Shelden *v.* Adams, 41 *Barb.*, 54, 57; Bank of Kinderhook *v.* Gifford, 40 *Barb.*, 659; Van Ness *v.* Bush, 22 *How.*, 481, 491.) These adjudications are, I think, more in accordance with sound principles, and as long as the legislature enacts laws for the public benefit, it is plainly the duty of the courts to execute them with promptness and fidelity; so that if they operate injuriously or oppressively, the evil may be remedied by their repeal or modification. There

is much truth in the remark of PECKHAM, J. (in 40 *Barb.* 659), above cited: "There should be no selection or choice by the courts, as to what laws should be enforced, and what should be evaded or nullified. What should be favored, and what should be treated with disfavor. The principle and policy of this favor and disfavor are wrong." While I am free to say, that there should be caution and hesitation in allowing a defence of usury, or of the statute of limitations, after the pleadings have once been put in, and the issue framed; and that this as well as other defences long delayed, and which might operate injuriously, from the circumstances surrounding them, should only be let in, where justice will be substantially promoted; yet every case must, to some extent, be left to the sound judgment and discretion of the tribunal to which the application is addressed, and if the discretion has not been improperly exercised, the decision should not be disturbed.

The learned justice who granted the motion of the defendant at special term, had, as referee, previously heard all the evidence in the case. There was testimony showing that the note had been obtained improperly, without consideration; and while the defendant was in a state of intoxication. The defendant himself had never realized a single dollar upon the note, and had no dealings with the plaintiff. Under the circumstances existing, I am not prepared to say that the judge has exceeded his power, or violated any rule of law. Upon the whole, the order appealed from I think should be affirmed with some modification. As a new defence is allowed, which might entirely defeat the plaintiff's cause of action, the plaintiff should have an election to discontinue, and if he so elect then the defendant should pay the plaintiff's costs of suit, and ten dollars, costs of this appeal. If the plaintiff refuse so to elect, then the order should be affirmed, but without costs of appeal.

PECKHAM, J., concurred.

HOGEBOOM, J., gave no opinion.

THE PEOPLE *ex rel* RICHMOND *against* THE PACIFIC MAIL STEAMSHIP COMPANY.

Supreme Court, Second District; Special Term, Nov., 1867.

MANDAMUS.—COMPELLING PRODUCTION OF CORPORATE BOOKS.

A corporation was required by its charter (in addition to the general provisions of the Revised Statutes upon the same subject), to cause a book to be kept containing the names and residences of all stockholders, the number of shares held by them respectively, &c., which book, the charter directed should, at all reasonable times be open for the inspection of the creditors and stockholders of the corporation. The corporation kept no book precisely answering to the requirement of the charter. It kept, however, a transfer book, a register of certificates of stock, and a stock ledger. On application by a stockholder, for an opportunity to inspect the book prescribed by the charter to be kept, the officers of the corporation offered an inspection of the transfer book and register, but refused to permit the stock ledger to be examined.

Held, 1. That the stockholder was entitled to an inspection of the stock ledger; that being, of all the books kept by the company, the one which most nearly fulfilled the requisites of the charter provision. The circumstance, that it contained more facts than the charter required to be stated, formed no excuse for refusing to furnish it, so long as the company neglected to keep the book required.

2. That the stockholder's right to have an inspection of the stock ledger might be enforced by mandamus.

Motion for a mandamus.

Aaron J. Vanderpoel and *James Emott* for the motion.

Clarkson N. Potter, opposed.

GILBERT, J.—The relator, a stockholder of the defendant's corporation, having applied for an inspection of the transfer books, and the book or books of the company containing the names of the stockholders, was offered the transfer books and

two books containing registers of certificates of stock extending back to 1864. The corporation has no stock list, nor do they keep the book which the 13th section of their charter, hereafter noticed, requires them to keep. The relator states that to ascertain who hold stock in the company, and the number of shares, would require an examination of every entry in these books, and in any book of the same description going back to the organization of the company in 1848; that he afterward demanded an inspection of the stock ledger, which was refused. He then states what a stock ledger is, and shows that an inspection of it would give him the information sought.

The company do not deny that an inspection of the stock ledger would give the relator the information which he has a right to have, but they justify their refusal to exhibit the stock ledger, on the ground that it is a book of accounts between the company and its shareholders, and shows their dealings in the stock of the company. That it is always regarded as confidential between the parties concerned, and that the information it contains might be used for improper purposes.

A case is not made, which, under the rules of the common law, entitles the relator to a *mandamus*. (*Taylor Ev.*, § 1102; *Grant Corp.*, 311.) His right to the remedy sought depends on the construction to be given to section 13 of the company's charter, and section 1 of title 4, chapter 18, part 1, of the Revised Statutes.

The charter provides as follows:

"Section 13. It shall be the duty of the said corporation to cause a book to be kept by the treasurer or clerk thereof, containing the names of all persons who are or shall within two years have been stockholders in said corporation, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares; which book shall at all reasonable times be open for the inspection of the creditors and stockholders of the said corporation, at the office or principal place of business of said corporation."

The charter also confers the usual power to make by-laws. The 18th by-law provides that in ascertaining the number of votes on which each stockholder is entitled to vote at the elec-

tion of directors, the inspectors shall be governed by the number of shares standing in his name, as shown by the stock ledger after the closing of the transfer books preparatory to such election.

By the Revised Statutes "the book or books of any incorporated company in this State, in which the transfer of any stock in any such company shall be registered, and the books containing the names of the stockholders in any such company shall be open to examination by any such stockholder." This latter enactment was first made in the memorable act to prevent fraudulent bankruptcies of corporation, passed in 1825. The provision of the charter is in aid of the objects of this statute; and in the determination of this question, both are to be taken together. Being remedial acts, and also beneficial to the public, they should be equitably construed, so as to promote and not impede or frustrate the objects intended. (Cotheal *v.* Brouwer, 1 *Seld.*, 562; *Reviser's notes*, 5 *Edm. Stat.*, 280.)

The question, then, is whether the stock ledger is embraced within the designation of the books which the statute cited gave the relator a right to inspect or examine. If it is, I think the duty of enforcing the right by *mandamus* exists, and under the circumstances of this case, is the appropriate and only remedy. (People *v.* Throop, 12 *Wend.*, 183.)

Turning then first to the Revised Statutes, I think it clear that a right of inspection generally is not given, but that it is restricted to the registers of transfers and the list of stockholders; or if such books are not formally kept, to such books as the company do keep for the purpose of showing the original ownership of the stock, and the changes which shall have occurred from time to time in such ownership. The book prescribed by the charter is such a book. It is a register of transfers and a stock list combined. The stock ledger, although not exactly the book prescribed by the charter, will serve all the purposes of that book. The books offered do not answer this purpose. They contain the original transactions merely, whereas the statutes give a right to inspect the accounts, or registration of them. The stock ledger is such an account or register, although it contains more than the Legislature in-

tended. It is the only book kept by the company, an inspection of which would secure the objects of the statutes. The charter provides for the obtaining of the requisite information in the summary and convenient mode which the book would afford. The company cannot be permitted to defeat these objects by omitting to keep the book prescribed. The statutes do not point out the mode in which the books shall be kept, but describe them by reference to the contents of them; a stockholder cannot be deprived of the right to inspect them because they are kept in a particular way, or because they contain along with the information to which he is so entitled, other information which he has no right to demand. These statutes were passed for the benefit of the stockholders and for the government of the company. The right of inspection is a substantial one, the object of it being to aid the stockholder in promoting the interests of the company, and his own, by the choice of directors. Although the legislature did not intend to create an offensive or vexatious *espionage*, yet if such an evil results from the wilfull neglect of the company to keep the books, which would secure the right of the stockholder to inspect, without producing the evil, it is not the fault of the stockholder, but that of the company, and such neglect ought not to operate to his prejudice. To justify the refusal of the company to show the only book the inspection of which would secure the right granted by the statutes to the stockholder, would in effect enable corporations to defeat or render nugatory the statutes, by means of a wilfull omission of duty by the officers of such corporations. This cannot be tolerated. If the corporation does not keep the books which the statutes prescribe, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statutes give the stockholders the right to know. It may be added, that the by-law referred to, makes the stock ledger evidence of the stock held by each stockholder. Every stockholder has a right to know who are qualified voters, and the number of votes each stockholder is entitled to cast. (1 *Seld.*, 562.) How can he acquire this information otherwise than by an inspection of this book? It is said it would be wrong to issue the high prerogative writ of *mandamus* for reasons of

convenience merely. The answer to this is, that the relator is under no obligation to accept a substitute for that to which he is legally entitled. No power is vested in the officers of the company to compel him to take anything in lieu of that which the statutes give him. (1 *Seld.*, 562.) Such are my conclusions upon the case. It follows, therefore, that the motion must be granted.

O'BRIEN *against* THE PEOPLE.

Court of Appeals; March, 1867.

TRIAL FOR HOMICIDE.—APPEAL.—QUALIFICATION OF JURORS.

The provision of section 3 of *Laws of* 1855, 613, ch. 337,—that on writ of error to review a conviction for a capital offence, the Appellate Court may order a new trial if "satisfied * * * that justice requires a new trial, whether any exception shall have been taken or not in the court below,"—does not permit an appellate court to disregard an error adverse to the prisoner, committed in the proceedings below, upon the ground that upon the whole case the guilt of the prisoner is clear.

That act was intended to enable the courts to grant a new trial asked on behalf of a prisoner, notwithstanding technical omissions by his counsel on the trial; it does not authorize them to disregard any errors which prior to its passage would have entitled a prisoner to a new trial.

A veniremen summoned to try a capital cause, testified, upon challenge for principal cause that he had conscientious scruples against finding a verdict in a case involving life and death; but explained that he was not opposed to capital punishment, but his scruples rested on other grounds. *Held* that he was disqualified. The grounds of his scruples were unimportant. It was enough that they existed.

General impressions, relative to the cause about to be tried, derived from reading statements in the newspapers, and not amounting to an opinion upon the guilt or innocence of the prisoner, do not disqualify a person from serving upon the jury.

It is competent for the presiding judge to try a challenge to the favor, upon

consent of parties; and where he does try it, without objection or request to submit the challenge to triors being made at the time, it will be implied that he did so by consent.

On a trial for murder, the indictment containing two counts, one for killing M., and one for killing S., the prisoner's counsel asked the court, at the outset, to require the district attorney to elect on which he would proceed. The court reserved its decision; and no objection thereto was made. The evidence showed that the deceased was known by both the names used in the indictment. At the close of the evidence, the court required the district attorney to elect;—he elected to proceed under the count for killing S.;—a *nolle prosequi* was then entered upon the other count;—the counsel for prisoner then moved to strike out all evidence referring to the party under the name of M.; —the motion was granted, and the jury found a verdict of guilty. *Held* that no error was committed; and that, there being ample evidence of the killing S., after striking out all that related to M., the verdict must be sustained.

A witness not a professional expert, is not competent to express a general opinion upon the question whether an individual was sane or insane; though when examined as to what he himself witnessed in regard to such individual, he may state the impression produced on his mind by what he observed.

Error in an answer given by the judge to a question put by a juror, on a criminal trial, will not affect the conviction where the question had clearly no pertinency to the case made by the evidence, and no clearer or more particular instructions upon the subject of it, than those previously given by the judge, in his charge, were, in any aspect of the case, necessary.

Writ of error to the Supreme Court in the First District.

The facts involved in this case are fully stated in the opinion.

BOCKES, J.—The plaintiff in error was convicted in the court of general sessions for the city and county of New York, of murder in the first degree, for killing Kate Smith, on the 20th June, 1866. On writ of error from the Supreme Court the conviction was affirmed, and judgment thereon was directed to be executed; whereupon a writ of error was sued out from this court, to the end that the case might be considered here.

It appears, from the evidence, that the prisoner had been in relations of criminal intimacy with the deceased, Kate Smith, for several months prior to the 20th June, the day of the homicide; and having become jealous by reason of favors extended by her to another, he had committed violence upon her, for which she had caused his arrest, and a trial or an examination in regard to it was soon to be had. The deceased occupied a room in a house of ill-fame. A very short time,

about one hour perhaps, prior to the fatal occurrence, the prisoner sent her a letter, excusing his conduct, promising not to repeat the offence, and requesting her to absent herself from the examination. The deceased returned a reply, not produced, nor was its purport proved. Soon thereafter the prisoner proceeded to her room, carrying with him a large knife, which, on his way, he took secretly from a fish-stand. He immediately attacked the deceased, whose screams brought the inmates of the house to the room. When first seen the parties were on their knees, facing each other, on the floor—the deceased, in great terror, imploring the prisoner to desist and give up the knife. The deceased then darted from him and passed from the room down the stairs, closely followed by the prisoner, who overtook her at the stair-landing, and plunged the knife into her back, causing almost instant death. He was immediately arrested, when he told the officer that he committed the deed, and should plead guilty to save the expense of a trial.

These facts stand clearly and indisputably proved. They present to us a case of unjustifiable homicide, most atrocious and revolting. It was without shadow of excuse or circumstance of palliation. The act was evidently fully designed and premeditated, and was deliberately carried into effect, in a manner exhibiting the most brutal and heartless depravity.

It seems impossible that the jury could have regarded their oath, and returned any other verdict than guilty of murder in the first degree. Still the prisoner was entitled to a trial in all respects in accordance with the settled rules and forms of law; and if not so tried, his conviction was illegal, and he may demand another hearing before a jury of his country.

We do not understand that the act of 1855 (*Laws of* 1855, 616, ch. 357), has changed the former rule of law, so as to permit an error affecting the prisoner's legal rights to be disregarded in this court. However clear his guilt may appear, that act took nothing from the accused, but was passed for his advantage in this respect, that a new trial might be awarded when substantial justice seemed to require it, even although the record disclosed no error of law. It placed him on the higher plane of substantial right, untrammelled by technical omissions occur-

ring through the ignorance or inadvertence of counsel, and authorized this court to intervene in his favor, in cases where before it was powerless to grant relief. In this view the act of 1855, was conceived in a spirit of liberal and enlightened humanity. But it was not intended to authorize, nor does it in terms, or by fair construction, authorize this court to disregard errors, which, prior to its passage, were available to the accused as grounds for a new trial. These grounds still remain to him, whatever may be his condition of guilt.

We are therefore required to examine the rulings and decisions of the court in which the trial was had, to see if any error was there committed prejudicial to his right. If the record disclose such error, the conviction should be set aside.

It is first urged that Lewis Friedman, called as a juror, and challenged for principal cause, was improperly set aside by the court. On his examination he testified that he had conscientious scruples as to finding a verdict in a case involving life and death. He was not, consequently, a competent juror in a case where the prisoner was charged with murder in the first degree. Then he further stated that he was not opposed to the policy of the law inflicting capital punishment, and that his scruples consisted in tender feelings toward the prisoner—a fear that he should do him wrong. The fact, however, still remained, according to his statement, that he had conscientious scruples against finding a person guilty of a crime the penalty of which was death. The grounds for his scruples, or his reasons for them, were of no importance. That they existed was sufficient to exclude him from the panel. (32 *N. Y.*, 147, 160-1.)

It is next urged that the challenge to Mr. Bluhdorn was improperly overruled. This juror was called and challenged to the favor. On being examined, he stated that he had a faint recollection of hearing of the occurrence through the newspapers at the time, but formed no opinion or positive decision as to the guilt of the prisoner; that the newspaper statement left no particular impression on his mind as to the guilt of the person named, except as a newspaper statement; that he believed a homicide had been committed, and by the person named. This is the substance and import of his examination. It is plain that the challenge was not supported. It did not

appear that the juror was prejudiced against the prisoner, or had formed an opinion as to his guilt or innocence, from what he had read or heard; and he was clearly competent, unless general impressions, obtained from reading newspaper accounts of the daily events occurring in our midst, will disqualify the reader from judging impartially of them, when brought under examination, on sworn evidence in a court of justice. It has been often held that impressions so made do not disqualify a person from sitting as a juror. (2 *Barb.*, 222; 1 *Parker Cr. R.*, 302; 2 *Id.*, 16; 4 *Id.*, 132–7; 5 *Id.*, 414, 423–5.) Were a different rule to obtain, the most intelligent and upright portion of community would be generally excluded from the jury-box, leaving cases of the highest importance to individuals and to community, to be determined by the more ignorant and least competent. (3 *Den.*, 121.) Moreover, the challenge was for favor, the decision of which, as a question of fact, was final, and the exception unavailing. (21 *N. Y.*, 134; 22 *N. Y.*, 147.) It is urged that the challenge should have been determined by triors, not by the court. But the exception was not put on this ground. It was competent for the court to act as trior upon the challenge to the favor, and it must be assumed that he did so act, by consent of the parties, in the absence of all objections, or request to submit the question to triors. (4 *Wend.*, 229; 21 *Id.*, 509; 4 *Parker Cr. R.*, 132.) It was decided in the case cited, The People *v.* Mather (4 *Wend.*, 229) that, "When the facts on which a challenge rests are disputed, the proper course is to submit the question to triors; but if neither of the parties ask for triors to settle the issue of fact, and submit their evidence to the judge, and take his determination thereon, they cannot afterward object to his competence to decide that issue. The production of evidence to the judge, without asking for triors, will be considered as the substitution of him in place of triors; and his decision will be treated in like manner as would the decision of triors."

It seems, therefore, that there is no ground on which to predicate error on the decision of the court overruling the challenge interposed against the juror Bluhdorn. No other suggestions of error are now made to the forming of the jury, except the two above considered. Others were urged in the court

below, but not being here insisted on, we suppose them to have been there satisfactorily disposed of.

It is next insisted that the court erred in not requiring the district-attorney to elect, at the commencement of the trial, under which count of the indictment he would proceed.

The indictment contained two counts. In the first the prisoner was charged with feloniously killing one Lucy A. McLaughlin; and in the second with feloniously killing one Kate Smith. After the jury was impanelled, the prisoner's counsel requested the court to direct the district-attorney to elect on which count he would proceed. The court thereupon stated that the motion would be reserved, and thereafter decided. No exception was taken at the time, to this disposition of the motion, and the trial proceeded. The evidence showed that the deceased was known by the name of Kate Smith. She was generally, if not always, called by that name. One witness testified that she once told her that her name was Lucy Ann, and that she once wrote it, on a box, Lucy Ann McLaughlin.

At the close of the evidence the court alluded to the motion made at the opening of the case, and required the district-attorney then to elect under which count he would claim a conviction. The district-attorney elected to hold the second count, in which the prisoner was charged with killing Kate Smith: and a *nolle prosequi* was thereupon entered by order of the court to the first count. The counsel for the prisoner then moved that all the evidence referring to Lucy McLaughlin, or to the party under the name of Lucy McLaughlin, be stricken from the record, which motion was granted.

In all this the record discloses no error. Indeed there was no exception taken on which error could be predicated. The course adopted by the court in reserving the decision, seems to have been acquiesed in at the time; and when a ruling was made, it was in all respects as full and extensive as the prisoner's counsel desired.

It is true that, under the act of 1855, the prisoner may have a new trial, even though no exception be interposed; but before he can claim the benefit of that act, it must be made to appear to the court that the verdict was against the weight of

evidence, or against law, or that justice requires a new trial. Here was no error of law, and the evidence of guilt is certainly overwhelming. If every paragraph of the evidence in which the name of Lucy Ann McLaughlin occurs, be stricken out, as it was in fact, there is proof abundant remaining to convict the prisoner of the murder of Kate Smith. Nor could the admission of the evidence which was afterwards stricken out have operated to the injury of the prisoner. It did not tend to prove him guilty of any other or different offence than that of which he was convicted, for Lucy Ann McLaughlin was the same person called and known as Kate Smith, whose tragic death alone was the subject of examination. Most clearly the prisoner has no cause of complaint as regards this branch of the case.

It is urged that the letter produced and read on the trial was not sufficiently identified as the one sent to the deceased by the prisoner. This position is wholly unsupported by the facts. It was proved clearly that he wrote or originated it. A witness swore that he delivered a letter to the deceased at his request, shortly before the fatal occurrence, and that she returned an answer. It was picked up in the house, and in, or near her room, soon after, and being read in the prisoner's presence, he admitted its authenticity. More direct and satisfactory evidence of its identity can hardly be conceived.

One other subject remains for our examination. The defence relied on was insanity or moral irresponsibility. It was insisted on the trial that the prisoner was at the time laboring under an attack of *delirium tremens*. An unprofessional witness, a printer by trade, testified that he saw the prisoner about twelve or one o'clock of the day of the homicide; that the prisoner had a wild vacant look about his eyes; was fidgetty and uneasy; spoke in a husky tone of voice.

The counsel for the prisoner then proposed to prove him insane or delirious, by the opinion of the witness. One of the questions propounded was as follows; "Was he or not, in your opinion, insane or delirious?" The question was excluded. The court remarked that the witness was at liberty to state the facts within his knowledge, but could not be permitted to give his opinion.

The ruling of the court was manifestly correct, according to

numerous decisions, both in the Supreme Court and this court. It was laid down in Dewitt *v.* Barley (9 *N. Y.*, 371), that "the opinions of witnesses, other than those who are specially qualified by scientific knowledge to judge of such matters, are not competent evidence of soundness or unsoundness of mind," except in cases of subscribing witnesses to wills and deeds. (See, also, The People *v.* Lake, 12 *N. Y.*, 358; and Clapp *v.* Fullerton, 34 *N. Y.*, 190.)

The true rule and line of distinction, as regards professional and non-professional witnesses, were laid down with clearness and precision by PORTER, J., in Clapp *v.* Fullerton. As there stated, a layman, when examined as to facts within his own knowledge bearing on the question of sanity, may be permitted to characterize the acts to which he testifies, as rational or irrational. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question whether the mind of the individual be sound or unsound. We adhere to the rule on this subject laid down in the case cited. The court was not in error in excluding the opinion of the witness on the subject of the prisoner's sanity or insanity.

Nor was there any error in the charge of the judge on submitting the case to the jury. He defined the crime of murder correctly, as declared by the statute and by the common law; drew the attention of the jury to the leading and controlling facts of the case, and distinctly and intelligently instructed them on the subject of premeditated design. In regard to the alleged defence of insanity, he stated that, to establish that defence, it must be made to appear that the prisoner was, at the time of the homicide, laboring under such a defect of reason as to be unconscious of the nature, character, and consequence of his acts; that voluntary intoxication was no excuse for crime; but that actual insanity, even when brought on by long-continued vicious or improper indulgence, would furnish immunity from punishment for acts which, under other circumstances, would be criminal. This was sound law; just in its application to the conscious offender, yet recognizing the exemption due to those bereft of the power to discern between right and wrong. (31 *N. Y.* 330, and cases there cited.) I am

not so well satisfied with what occurred when the jury returned into court for further instruction. A juror inquired as follows: "Is a person under *delirium tremens*, of sound mind, in the meaning of the statute?" If the facts in proof were such as to make this inquiry material or essential to the decision of the case by the jury, they were entitled to a direct and explicit answer from the judge. This was not given. The jury were left without that clear and explicit instruction called for by the inquiry. The judge read to them the law applicable to a condition of drunkenness, in which a paragraph occurred bearing on the subject in regard to which information was desired, and which, with some amplification, would have met the question. The paragraph was this—that if reason be perverted or destroyed by fixed disease, though brought on by a person's own vices, the law holds him not accountable. I think the question was not fully and clearly answered by this observation, which incidentally occurred where another subject was more directly under consideration. Had the facts proved made the question put by the juror apposite to the case, the court should have answered that *delirium tremens* was actual insanity, and irresponsibility was the result, if the alleged offence was committed while the individual was deprived of reason by such settled or fixed disease.

But the case did not call for any instruction on the subject. There was no evidence of insanity or moral irresponsibility. There was no evidence that the prisoner was laboring under the disease known as *delirium tremens*. On the contrary, the evidence was unmistakable that the prisoner was governed by a responsible will and motive. Even if the statement of Doctor Shier be accepted, as proving the fact that about a week prior to the commission of the homicide, the prisoner was suffering from an incipient attack of the *delirium tremens*, there is no evidence that it culminated to an extent producing insanity.

The evidence is clearly to the contrary. The letter he wrote or dictated, and sent to the deceased, immediately prior to the affray, evidences the existence of memory, reason, will and purpose, and consequent moral and intellectual power and responsibility. So, also, his remarks at the time of, and immediately succeeding, the occurrence. No witness speaks of any-

thing remarkable or unreasonable in his conversation or acts. Indeed, there is a total absence of all evidence showing that he committed the act under any delusion or condition of irresponsibility, such as may be urged by way of exculpation. On the contrary, it stands proved that, in the full exercise of his faculties, and governed by a wicked impulse which the law denounces and the good abhor, the prisoner deliberately sought out, and slew his victim, in brutal disregard of her supplications and entreaties to be spared her life.

The question put by the juror had no pertinency to the case made by the evidence, and more precise and elaborate instructions on the subject of *delirium tremens* were needless.

After a careful examination of the case, we are of the opinion that the record discloses no error of law, nor is the evidence of guilt at all doubtful, or such its character or degree as to induce us to grant a new trial, on the ground that substantial justice demands it.

We must hold that the conviction of murder in the first degree was right, and that the judgment which the law directs in such case must be carried into effect.

Conviction affirmed.

STAIGER *against* SCHULTZ.

Court of Appeals, September, 1867.

COSTS.—REVIEW ON APPEAL.

In causes of an equitable nature—*e. g.*, an injunction suit—it is discretionary with the court in which the action is brought to grant or refuse costs. The amendments to the Code of Procedure, passed in 1862, did not affect this rule.

An order of such court, directing that the plaintiff may discontinue the action without costs, is not reviewable in the court of appeals.

Appeal from a judgment and order of the New York Common Pleas.

This action was brought against the defendant and others, composing the Metropolitan Board of Excise. The facts involved in the present appeal are stated in the opinion.

George Bliss, jr., for the appellants.

Philip F. Smith, for the respondent.

BOCKES, J.—This is an appeal from the judgment of the general term of the Court of Common Pleas of the City and County of New York, affirming the judgment of the special term, by which the action was discontinued without costs.

The action was in equity, to restrain the defendant from enforcing against the plaintiff, the act of the Legislature, passed April 14th, 1866, entitled "An Act to regulate the sale of intoxicating liquors within the Metropolitan Police District of the State of New York"—on the ground that the act was unconstitutional and void.

The plaintiff, in his complaint, demands judgment that the act alluded to be adjudged invalid, and that the defendant be enjoined and restrained from enforcing its provisions againt him.

The pretence of invalidity set forth in the complaint was determined by this court adversely to the plaintiff's claim, and thereupon, on motion, he was permitted, by an order to that effect, to discontinue the action without costs; and judgment of discontinuance without costs, was entered accordingly.

The defendants protest against the order and judgment, in so far as it deprives them of the costs of the action.

It is first insisted that the defendants were entitled to costs as a matter of legal right, on dismissal of the complaint or its equivalent, the discontinuance of the action; and sections 304 and 305 of the Code of Procedure are relied on, in support of this position.

Prior to that amendment, costs were most clearly in the discretion of the court in equity actions.

Section 304 declared that costs should be allowed to the plaintiff, upon a recovery in the cases therein specified, among which were actions of which, "according to section 54, a court of a justice of the peace held no jurisdiction."

Section 305 provided that costs should be allowed of course, to the defendant in the actions mentioned in section 304, unless the plaintiff was entitled to costs therein; and by section 306, in other actions costs were to be allowed or not, in the discretion of the court.

The "other actions" here alluded to, embraced equity actions in which costs would be given or withheld, as the court should direct.

This is very plain; indeed is conceded by all. But by the amendment of 1862, the words "according to section 54" were omitted in sub-division 3 of section 304, and it is insisted that as the section now stands, the plaintiff is entitled to costs in all cases of a recovery by him in an action of which a justice of the peace has no jurisdiction, and as a consequence by section 305, the defendant must have costs in all such cases if the plaintiff be not entitled to costs.

This construction, however, renders meaningless the first sub-division of section 306, which declares that "in other actions costs may be allowed or not, in the discretion of the court."

It is indisputable that this paragraph embraced equity actions prior to 1862.

It was introduced principally, if not solely, with a view to a fair and just imposition of the burden of litigation, according to the equities of the particular case.

This right had been exercised by courts having equity powers from time immemorial, and was always deemed essential to the proper exercise of equity jurisdiction.

We cannot believe that the legislature intended to effect so great a change, in the absence of an express declaration to that effect.

Had such intention existed, it would not have been left, as we conceive, to mere construction. Especially must we so conclude when such construction renders other provisions of law nugatory.

All the provisions bearing on the subject under consideration should be read together, and should be so construed as to take effect in harmony.

Governed by this rule of interpretation, the right to give or

withhold costs to a party in equity cases rests in the discretion of the court, as declared by section 306, and such discretion it is not the province of this court to direct or control.

Again, it has always been the practice to permit actions to be discontinued, in the discretion of the court, without costs, even in suits at law, when the defendant had obtained a discharge under the insolvent law, and in many other cases. Such permission existed as a matter of practice, resting in the discretion of the court, and could not be overruled on appeal.

The numerous cases cited by the appellant's counsel, showing in what instances the court of equity jurisdiction will refuse permission to discontinue, without costs, have no pertinency in this court. Those cases were not proper for the consideration of the court on the hearing of the application. They were authorities on the question of practice in that court. But this court has not the power to correct errors of practice in the inferior court. We are also cited to various statutes in relation to costs, and particularly to 2 *R. S.*, 613, § 1, which provides that a plaintiff, in dismissing his bill or petition in a court of equity, shall pay to the defendant his costs to be taxed, except in certain cases there specified. But the Code abrogated these statutory provisions, and declared when, and under what circumstances, parties were entitled to recover costs, and they can now have them in no other cases. We are of the opinion that the order and judgment appealed from must be affirmed, but without costs of appeal.

This conclusion disposes of the appeal in Grace against the same defendants.

Order and judgment affirmed without costs of appeal.

CASE *against* HOTCHKISS

Court of Appeals, January, 1867.

ATTORNEYS FEES.—INTEREST.

In an action by an attorney retained to conduct a cause pending on appeal, for compensation for the services employed, evidence that there were in fact no merits in the case he was engaged to present, is irrelevant.

An account rendered by an attorney to his client, containing his charges for professional services, if retained without objection, becomes an account stated, and draws interest from the time when it was rendered.

Appeal from a judgment.

The action was brought by James H. Case against Hiram A. Hotchkiss, to recover on a bill for attorneys services. The facts involved are stated in the opinion.

PARKER, J.—This is an action to recover for the services of the plaintiff's assignors, as attorneys and counsellors-at-law. Only two exceptions appear in the case to have been taken upon the trial, and these raise the only questions which we can consider.

The first was to the decision of the court sustaining the plaintiff's objection to the following question put by the defendant's counsel to the plaintiff's witness on cross-examination: "Was there anything to argue?" The question referred to the argument of an appeal at the general term, in an action which the plaintiff's assignors defended for this defendant. The witness (who was one of the assignors) had already testified that the appeal was taken under defendant's direction, which evidence was uncontradicted in the case, and that he and his partners had paid other counsel for arguing it at the general term. The manifest point of the inquiry was, not whether the

case was before the general term in condition to be argued, but either whether there was any question presented for argument in the case as made, or whether there were any merits in the question presented to the court. Whatever was intended, the question was properly excluded. Whether the case presented to the court any question for its consideration, or whether the question presented had any merit or not, was quite immaterial, inasmuch as the attorneys had been employed by the defendant to carry the case to the general term, and were thereupon bound to see that it received the attention necessary to obtain the decision of the general term, sought by the appeal. Neither was it material with reference to the question whether an argument was in fact had. The obligation of the attorneys to be in attendance, by themselves or counsel, was the same in either case, and the fact that there was nothing to argue in the sense intended by the question, would have been no proper ground of inference that it was not, in fact, argued, in the legal sense of submitting the case to the general term for decision.

Besides, this became a matter of no importance in the case, from the fact that it was subsequently shown that the amount was liquidated by the defendant's admission, and no question was made as to the amount.

The other exception is to the charge of the judge, in which he instructed the jury that they might allow interest upon the amount of the account. It appeared by uncontradicted evidence that the account, as claimed in the complaint, was rendered to the defendant, on January 25th, 1859, and no objection was ever made to it, in respect to the amount or otherwise, prior to the commencement of the action, which was more than a year, and the trial was had more than two years after such presentation. The account was, I think, properly regarded as an account stated. (Lockwood *v.* Thorne, 1 *Kern.*, 170; Towsley *v.* Denison, 45 *Barb.*, 490; Phillips *v.* Belden, 2 *Edw. Ch.*, 1.) Being so regarded, it drew interest from the time when it was liquidated; which was at the time when it was rendered, inasmuch as no objection was ever made to it. (Walden *v.* Sherburne, 15 *Johns.*, 409; Patterson *v.* Choate, 7 *Wend.*, 441; Feeter *v.* Heath, 11 *Wend.*, 479.)

On the merits, therefore, the judgment is clearly right, and should be affirmed.

But, moreover, the appellant, when the cause was reached on the calendar, neither appeared to argue, nor subsequently furnished papers for the court. For this reason, the respondent is entitled to an affirmance of the judgment, and I think also, to ten per cent. damages for the delay occasioned by the appeal.

Judgment affirmed

STEWART *against* SCHULTZ.

Supreme Court, Second District; General Term, Oct., 1867.

DOUBLE COSTS.—INJUNCTION SUITS.

The provisions of 2 *Rev. Stat.*, 619, § 24, subd. 1,—giving increased costs to public officers—do not apply to an *injunction suit* brought to restrain a public officer from doing a threatened act, injurious to the plaintiff.

Appeal from an order determining a question of costs.

This action was brought by Matthew W. Stewart against Jackson S. Schultz and others, Metropolitan Police Commissioners and members of the Metropolitan Board of Health, to obtain an injunction restraining the defendants from interfering with the business of the plaintiff. A temporary injunction was granted. The injunction was afterwards dissolved, and the action discontinued "on payment of taxable costs."

On taxation of costs before the clerk, a question was made as to the allowance of double costs, to any of the defendants, as public officers. From so much of the clerk's adjustment as allowed increased costs, an appeal was taken to the special

term, where a retaxation was directed. The proceedings at special term are reported 33 *How. Pr.*, 3.

The defendants now appealed from the order at special term denying double costs and directing retaxation.

George Bliss, jr., for the appellants.

Abraham R. Lawrence, jr., for the respondent.

*By the Court.**—J. C. SMITH, J.—I think this case is not within the statute giving double costs, or taxed costs and one-half thereof in addition. (2 *Rev. Stat.*, 617, § 24, subd. 1.)

1. The only actions against public officers to which the statute applies are those brought for some act done by such officer by virtue of his office, or for the omission by him to do some act which it was his duty to perform.

The only purpose of the present action was to restrain the defendants from doing a threatened or anticipated act alleged to be injurious to the plaintiff.

The plaintiff did not claim to recover damages, nor ask for relief, either by reason of acts done or omitted; he sought to prevent certain official actions contemplated by the defendants. Such a case is not within the statute.

This was the ground on which Justice INGRAHAM disposed of the question at the special term, and I fully concur in it.

2. I think the statute, when adopted, applied exclusively to actions and proceedings in courts of law, and not to suits in chancery, and consequently it is not now applicable to actions of purely equitable cognizance.

I am in favor of affirming the order.

LEONARD, P. J., concurred.

Order affirmed.

* Present—LEONARD, P.J., FULLERTON and J. C. SMITH, JJ.

FINE *against* RIGHTER.

New York Common Pleas; Special Term, December, 1867.

DEATH OF DEFENDANT.—CONTINUANCE OF ACTION.

Where an action is commenced by service of process upon one only of several defendants jointly indebted, and the defendant served dies before judgment, and before the others are brought in, an order to continue the action against the personal representative of the deceased defendant is not proper. The action should be continued against the other defendants.

Motion for leave to continue an action.

The facts are stated in the opinion.

Christopher Fine, for the motion.

Henry N. Beach, opposed.

VAN VOORST, J.—The defendants are sued as copartners, upon a liability of the firm for professional services rendered them. The action was commenced on June 12, 1866, by the service of a summons on the defendant Samuel F. Righter. The other defendants have not been served. The defendant served appeared in the action by an attorney, and interposed an answer to the complaint.

After issue joined, the defendant who was served died, and letters of administration were issued by the surrogate of New York to William A. Righter, as administrator, &c., of the deceased defendant.

On the cause of action set forth in the complaint, the defendants were jointly, as copartners, liable. In order to charge the joint property by execution on a judgment to be recovered in this action, it was not necessary that process should be served on all the defendants. If served on one of the joint contractors only, judgment could have been entered against all the

defendants, so as to charge the joint property, and the separate property of the party served.

That result would have followed from the service in this action upon the defendant Samuel F. Righter, in the event that judgment had been recovered in his lifetime. The death of this defendant (the obligation being a joint one on the part of all the defendants), does not abate the action. It should proceed against the surviving defendants.

Upon the death of a partner, the surviving partners succeed to the property and rights of the partnership, and administer its affairs. If a suit is to be brought on a joint liability under such circumstances, the surviving partners alone should be sued. It is not proper, in an action at law, to unite the legal representatives of the deceased partner as defendants with the survivors. The separate property of the deceased partner is not liable until recourse be first had to the joint property.

There are cases in which the legal representatives of a deceased defendant have been brought in as parties with other defendants, but only where the action was in tort, and the liability of the defendants was several as well as joint. The cases to which I have been referred by the counsel for plaintiff were in actions for wrongs, in which the defendants were severally liable. (Gardner *v.* Walker, 22 *How. Pr. R.*, 405; Union Bank *v.* Mott, 27 *N. Y.*, 633.)

In the case at bar, the action should proceed against the surviving defendants. There is no foundation in the complaint for charging the separate property of the deceased defendant in the first instance with this joint obligation, nor any reason assigned for continuing the action against the legal representatives of the deceased partner alone.

Motion denied without costs.

TICKNOR *against* KENNEDY.

New York Common Pleas; Special Term, July, 1867.

MARINE COURT JUDGMENT.—SUMMONING JOINT DEBTORS.

After a transcript of a judgment of the Marine Court for more than $25, exclusive of costs, recovered in an action commenced by the service of process on one only of several defendants jointly indebted, has been filed in the office of the county clerk, the plaintiff may issue a summons in the New York Common Pleas (under section 375 of the Code of Procedure), to a joint debtor not served, requiring him to show cause why he should not be bound by the judgment.

Motion to set aside a summons issued under section 375 of the Code of Procedure.

This action was commenced in the New York Marine Court, by service of process upon one only of several defendants jointly indebted. A judgment having been recovered for more than $25, exclusive of costs, the plaintiff's attorney filed a transcript of it in the county clerk's office, and then issued a summons in the New York Common Pleas, requiring one of the debtors not served to show cause why he should not be bound by the judgment. This summons, and the service thereof, the party moved to set aside.

Smith & Woodward, for the motion.

Stephen A. Walker, opposed.

BRADY, J.—Section 68 of the Code provides that a judgment for twenty-five dollars or over, a transcript whereof is docketed in the office of the clerk of the county "shall have the same effect as a lien and be enforced in the same manner, and be deemed a judgment" of this court.

"To enforce" is "to put in execution," "to cause to take

effect;" and to require the defendant not served to show cause why he should not be bound by the judgment recovered against his co-debtor is to put it in execution, to cause it to take effect.

I am aware that section 375, under which the defendant not served may be proceeded against, does not apply to justices' courts or to the Marine Court (§ 8), but that does not affect the question. It determines simply that the justices' courts, &c., have not the power to carry out the provisions of that section. Where a judgment shall be recovered against one or more of several persons jointly liable, those not originally served may be summoned (§ 375) to show cause why they should not be bound by the judgment, but by the filing of the transcript a judgment is recovered in this court, and such being the fact, the statute applies equally to that as to a judgment recovered in an action originally commenced here.

It is enforced when it is sought to collect the amount for which it was rendered, or to compel the application of a debtor's individual property to its payment. The judgment is effective against the joint property of the debtors, and if those not originally served are also bound by it under section 375, it is only to the extent of authorizing the seizure of property individually held. The sphere of the judgment is enlarged, not changed.

I think the plaintiff herein entitled to proceed under the provisions of the section mentioned, and the motion to dismiss must be denied, but without costs, the question being new.

Motion denied.

HERMANN *against* AARONSON.

New York Common Pleas; Special Term, December, 1867.
Again, January, 1868.

DEPOSIT IN LIEU OF BAIL.—ORDER FOR REPAYMENT.

A motion to refund money deposited instead of bail, pursuant to section 197 of the Code of Procedure, cannot be made until after the giving and justification of bail.

Under section 199 of the Code the court is authorized to refund the money to the defendant, alone.

It seems however that if there are no conflicting claims made, to the money, the court may, at a proper time, make an order that the money be paid to a third person who is shown to have advanced it to the defendant, on his arrest.

Where, upon the issuing an order of arrest, the defendant makes or procures to be made a deposit of money in lieu of giving bail, and the money remains on deposit up to the time when the plaintiff obtains judgment in the action, the plaintiff is entitled to have it applied in satisfaction of such judgment.

The fact that such money was the property of a third person, and was deposited under a special receipt stipulating that it should be returned on the surrender of the defendant, can make no difference. A deposit made in lieu of giving bail, from whatever source derived, must be treated, as between the plaintiff and defendant, as the property of the defendant.

December, 1867. Motion for repayment of money deposited with the sheriff in lieu of bail.

This action was brought by Isaac Hermann against Newman Aaronson. An order of arrest was issued, fixing the amount of bail at $2,500, and upon this order the defendant was arrested. Instead of the defendant's giving bail, his son, Joseph N. Aaronson, deposited with the sheriff the check of Aaronson Brothers, for $2,500—and took a receipt from his deputy, specifying that the deposit was "in lieu of bail for the

appearance of defendant on the order of arrest * * * said check to be returned on surrender of the defendant herein." The sheriff, pursuant to section 198 of the Code, deposited the check with the clerk of the court.

Application was now made for an order that the money be paid over, not to defendant, but to Joseph N. Aaronson.

The motion was made before any justification of bail.

There was some conflict in the affidavits as to whether the money belonged to defendant or to J. N. Aaronson. The money was also claimed to have been attached as the defendant's property.

Frederick Smyth, for the motion.

A. Blumenstiel, opposed.

VAN VORST, J.—I am satisfied that this motion cannot be granted. Section 199 of the Code provides that if money be deposited, as provided in the last two sections, 197 and 198, bail may be given and justified upon motion, as prescribed in section 193, any time before judgment, and thereupon the judge before whom the justification is had shall direct in the order of allowance that the money deposited be refunded by the sheriff to the defendant. No application for the refunding of the money can be made until bail has actually justified, and upon notice of not less than five nor more than ten days.

It does not appear that any notice of justification has been served on the other side, or that the bail has justified. The right to substitute an undertaking with sureties in the place of the money deposited, does not depend upon the favor of the court. It is given by the express provisions of the Code. The party should give bail to the sheriff just as he would, in the first instance, if no deposit had been made. The plaintiff should have an opportunity to except to the sureties, and he has ten days in which to do this after receiving from the sheriff a copy of the undertaking. After the justification of the sureties the application for the deposit may be made.

In addition to this there is no provision of law authorizing the money to be paid to any person other than the defendant

himself. The application in this case is that the money be refunded, not to defendant, but to J. N. Aaronson, who it is claimed deposited the same with the sheriff to procure the defendant's discharge from arrest. This the court is not authorized to do. There is a *per curiam* decision in Nunn *v.* Powell (1 *Smith*, 13), seemingly to the contrary. But this was in a contest between the depositor—a third party, and the defendant, after special bail had been perfected; there being no other claimants. In Edelsten *v.* Adams (2 *Moore*, 610), it was held that the money should be refunded to the defendant. In this latter case the money had been deposited by a friend of the defendant, and was claimed by the assignees of the defendant, who had become bankrupt. BURROUGHS, Justice, said: "The sum in question must be considered *in custodia legis*, and the court by statute is empowered to refund it to the defendant alone." These cases arose under the statute 43 *Geo. III., ch.* 46, which contains provisions on the subject, in many respects similar to the sections of the Code under consideration.

In Salter *v.* Weiner (6 *Abb. Pr. R.*, 191), it was held that the money by being deposited became the property of the defendant. There is good reason for such opinion, as the money is substituted for the person of the defendant who is under arrest. It is practically so, at least, until bail is put in and justified; and it may be taken and applied to the satisfaction of the judgment against defendant when entered. (§ 200.) In the event that there were no conflicting claims made to the money by the defendant, or others, the court could doubtless at a proper time make an order to pay the deposit to a third party who had advanced it for the benefit of the defendant on his arrest. (Douglas *v.* Stanbrough, 3 *Ad. & E.*, 316; Buell *v.* Turner, 1 *Mees. & W.*, 47.)

The case before me does not shew a state of facts, which would at present authorize the refunding of the money to any person.

The other objections raised by plaintiff that the motion is too late, on the ground that judgment has been already ordered in the action for the plaintiff's claim, although the record is not yet actually filed, and that the moneys have been

attached as the defendant's property, are not necessary to be considered, in the view that I have taken of this question.

Motion denied.

January, 1868. Motion that the clerk be directed to satisfy the judgment in the action, out of the deposit in his hands.

The defendant did not give bail in the action; and on December 26, 1867, judgment was entered against him for $1,769 14. The plaintiff now applied for an order directing this judgment to be satisfied out of the deposit in the hands of the clerk. The defendant opposed the motion on the ground that the original deposit was in lieu of bail, and that he was then ready and willing to surrender himself on any execution which might be issued against his person. Joseph N. Aaronson also made an affidavit to the effect that the $2,500 was the property of Aaronson Brothers, and that the defendant had no interest, direct or indirect, either in that firm or in those moneys.

A. Blumensteil, for the motion.

F. Smyth and *John McKeon*, opposed.

BARRETT, J.—The language of section 200 of the Code of Procedure is plain and unambiguous; it expressly directs that if the money previously deposited instead of bail, remain on deposit at the time of the judgment, it shall be applied in satisfaction thereof. There is no provision for such an application after the return "not found" of an execution against the person. The intention plainly was to treat the money deposited instead of bail, so far as the plaintiff and his rights are concerned, as the property of the defendant. Section 197 only authorizes such a deposit by a defendant, not by a third person. Where, therefore, the deposit is made by a friend on behalf of the defendant, it must be treated for all the purposes of the action in which it is made as an act performed by the

defendant himself under section 197, and the third person thereby, and notwithstanding any private agreement which he may have made with the sheriff, subjects the deposit to the operation of all the sections of the Code in respect to arrest and bail. If the sheriff violate his agreement, that is between him and the depositor; the plaintiff, upon the receipt of the certificate of deposit, has a right to rely upon it as the evidence of an exercise of the option conferred upon the defendant by section 197.

The money thus deposited does not stand in the place of a bail bond. The act of making the deposit is a something which the defendant is permitted to do "instead of giving bail." Treating the deposit as the defendant's property (and with reference to the plaintiff, it must, as we have seen, be so treated), it cannot be presumed that the legislature intended to compel the creditor, after judgment, to pass the money by, and accept instead the debtor's personal surrender, thus, in fact, releasing the money and enabling the debtor to reduce it to his immediate possession. It is more natural to assume that no qualification was intended of the plain language of section 200, whereby the money is forthwith subjected to the payment of the judgment.

Reference was made to the English statute (43 *Geo. III., ch.* 46, § 2), and to some cases under it as favoring the defendant's position, but I think they tend the other way. The deposit, under that act, was merely to secure the putting in of special bail, yet if such bail were not put and perfected within the eight days required by the *capias*, or such further time as might be granted by the Court, the plaintiff was, on motion, entitled to have the deposit paid directly over to him. This act was amended by 7 and 8 *Geo. IV., ch.* 71, of which ours is almost a counterpart. The amendment permits the defendant to deposit the money without putting in special bail, or even, after special bail has been put in and perfected, to make the deposit and take an *exoneretur* of the bail. It further provides that if the plaintiff recover judgment he shall be entitled by order, on motion, to receive the money so deposited or paid in court, or enough to satisfy the judgment. There is also the same provision as in our Code, for the defendant's withdrawal

of the money at any time before judgment upon putting in and perfecting bail. The cases under these acts are somewhat conflicting as to whether the money deposited by a third person will, when released by a judgment in favor of the defendant, be repaid, upon motion, to the third person direct, or to the defendant.

In Nunn *v.* Powell (1 *Smith*, 13), it was held that it should be repaid to the person who actually deposited it, and to whom it, in fact, belonged.

The contrary rule was laid down in Edelsten *v.* Adams, (8 *Taunt.*, 555), the Court declining to pass upon the rights or equities of outside claimants, and holding that it was bound by the express provision of the statute to order a return of the money to the defendant.

In Douglas *v.* Stanbrough (3 *Ad. & E.*, 16), the third person's application was granted, but upon the ground that as the defendant was represented upon the motion, and did not oppose, it was to be treated as his own application.

These cases may tend to throw some doubt upon the third person's right to the money even as against the defendant, and may perhaps afford an argument in support of the ruling in Salter *v.* Weiner (6 *Abb. Pr.*, 191), that the deposit by a third person amounts to a loan of the money to the defendant. It is not necessary to pass upon that question at present, and these cases are mainly useful as strengthening the position that the plaintiff has a right to subject the money to the immediate payment of his judgment, without distinction respecting the maker of the deposit.

I have discovered one case, however, which seems to be directly in point. (Bull *v.* Turner, 1 *Tyrw. & G.*, 367.) There, on the defendant's arrest, a Mrs. Lake refused to become special bail, but paid £68 10s. into court. The plaintiff having obtained judgment, procured a *rule nisi* why this sum should not be taken out by him in discharge of debts and costs. The defendant had rendered himself to prison, yet the court made the rule absolute, PARKE, B., remarking: "She (Mrs. Lake) can only have the money back on the same terms as he could have done."

The only distinction between the English act and our Code

is that under the former the deposit is made in express terms to abide the event of the action, while under the latter such is the fair import of the provision for its payment to the plaintiff upon the recovery of judgment.

Motion granted.

PEOPLE *ex rel.* MONDAY *against* SCHWARTZ.

Supreme Court, Second District; General Term, Sept., 1867.

JURISDICTION OF JUSTICE.—ELECTION DAY.

Where a summons in an action in a justice's court is returnable on the day of a general election, and there is no appearance, the justice acquires no jurisdiction; not even to adjourn the proceedings to another day.

A judgment entered upon such adjourned day may be reversed on *certiorari*.

Certiorari to review a justice's judgment.

On October 29, 1866, A. Walters, a justice of the peace of the Fifth District Court for the city of Brooklyn in the county of Kings, issued a summons in a civil action, at the suit of Frederick Schwartz against John Monday, requiring Monday to appear before said justice, at his court room, on the 6th day of November, 1866, at 8½ o'clock in the forenoon, to answer the complaint of Schwartz, &c.

On the return day of the summons the justice proceeded and called the case, the plaintiff being present; but the defendant Monday did not appear. The justice thereupon adjourned the case to November 13, 1867, when the case was called. The plaintiff again appeared, but the defendant did not. The justice thereupon heard the testimony of the plaintiff and rendered judgment in his favor. This judgment was now brought up for review.

Wm. L. Gill, for the relator.

By the Court.—LOTT, J.—The day on which the summons, issued by the court below, was returnable, was the general election day in November, 1866. The plaintiff (the defendant in error), appeared before the justice at that time, but the relator, who was the defendant in the action, did not appear, and the justice adjourned the case to a subsequent day; and on that day, in the absence of the relator, and without any appearance by him, rendered judgment against him in favor of the plaintiff. That adjournment was unauthorized. No court can be opened or transact any business on the day of such election, except for the purpose of receiving a verdict or discharging a jury, and in certain criminal cases. (See *Laws of* 1842, chap. 130, § 5, as amended by chap. 240 of *Laws of* 1847.) The subsequent proceedings by the justice were consequently without authority, and void. He had no more power to render judgment on the adjourned day than he would have had if no summons at all had been issued.

Judgment reversed with costs.

BROD *against* HEYMANN.

Supreme Court, First District; Special Term, January, 1868.

SERVICE BY PUBLICATION.—WHEN TIME TO ANSWER EXPIRES.

In cases of service by publication the computation of time is to be made excluding the first day and including the full period required for publication. The period required is six weeks—forty-two days.

Any judgment entered before that full period has elapsed, together with twenty days thereafter for answering, is premature and irregular, and should be set aside.

Motion to vacate a judgment.

This action was commenced by attachment October 3, 1867. Publication of the summons was commenced November 4, 1867; and the last publication was made December 9, 1867. On January 4th, 1868, judgment was entered by the plaintiff's attorneys for want of an answer. This judgment the defendants now moved to set aside; the motion being argued chiefly on the ground of irregularity in that the judgment was entered before the time to answer had expired.

Coudert Brothers for the motion. The Code declares that service shall be complete at the *expiration* of the time prescribed by the order for publication. The order is, once a week, for six consecutive weeks. In this case the first publication was made on the 4th day of November, the last was made on the 9th of December, and the service became complete at the expiration of the sixth and last week, to wit, on the sixteenth day of December, 1867;—add to this, 20 days in which the defendant may appear, and it brings us to the 5th of January, 1868. The judgment was entered on the 4th day of January.

Morrison, Lauterback & Spingam opposed. We claim that the defendant's time expired January 2, 1868. The summons was first published in the *Journal of Commerce*, on November 4, 1867, and in the *World* on November 5, 1867. The summons in the latter paper was published on the 5th, 12th, 19th and 26th of November, and on the 3d and 10th of December, 1867; or once a week for six weeks successively, as required by the statute. There is no claim that 42 days did not elapse between the granting of the order of publication and December, 13th, 1867, the time when the publication (as we insist) expired. Adding twenty days for answering brings us to January 2, 1868, as the last day. That this was more than was necessary, and that 42 days after publication are not required (for the reason, among others, that such a rule would require seven publications instead of six), and that the requirements of the statute, were, in the present case fully complied with, see Sheldon *v.* Wright, 7 *Barb.* 39; affirmed 5 *N. N.* (1 *Seld.*),

497; Batchelor *v.* Batchelor, 1 *Mass.* 255; Olcott *v.* Robinson, 21 *N. N.* 150.

CARDOZO, J.—(after disposing of a preliminary objection)—I think the judgment was entered too soon. It is well settled that the time to answer commences from the period that the service, whether personal or by publication, becomes complete. The only question here is, when did that service, which was made by publication, become perfect.

The cases relied on by the plaintiff's counsel do not bear upon the question, because they were made in matters arising before section 425 of the Code, which was enacted July 10th, 1851, had taken effect. By that section, which the learned counsel seems to have overlooked, the computation of the time is to be made by excluding the first day of publication, and including that which completes the full period required for publication.

The period required is six weeks—forty-two days—and including the first publication, and allowing the full period to elapse, as this statute expressly requires, it is manifest that the time had not expired when the notice of appearance was tendered.

I think, therefore, that the judgment was prematurely and irregularly entered and must be set aside, but without costs.

PITT *against* DAVISON.

Court of Appeals, January, 1868.

CIVIL PROCEEDINGS FOR CONTEMPT.—SERVICE.

In proceedings to enforce the rights of a party who has recovered a judgment in a civil action, by punishing the defendant as for a contempt, for refusing to comply with the judgment, *personal* service of the order to show cause why the defendant should not be punished is not indispensable. The orde

may be served on his attorney, in the same manner as other orders in the cause.

Where such proceedings are commenced by order to show cause, interrogatories are not necessary.

When a court of justice has obtained jurisdiction of the person of the defendant in an action, it retains jurisdiction for all purposes of enforcing the judgment, until its requirements are fully complied with; including jurisdiction to punish for contempt in refusing to perform it.

The proper mode of proceeding to punish for contempt in refusing to perform a judgment,—stated.

Appeal from a judgment of the Supreme Court.

The action was brought by Charles and William Pitt against Erastus Davison and others. The litigation was long continued and gave rise to many adjudications in the courts. The facts involved in the present appeal, are stated in the opinion.

Dennis McMahon, for the appellants.

E. F. Ballard, for the respondents.

PARKER, J.—This is an appeal from an order of the general term of the Supreme Court, reversing an order of the special term, which denied defendant's motion to set aside a previous special term order adjudging the defendant guilty of a contempt of court, and committing him therefor.

The action was for the specific performance of a contract by which Joseph Davison agreed to convey certain premises to the plaintiffs. Judgment was rendered adjudging the plaintiffs entitled to a specific performance of the contract, and directing this defendant, to whom Joseph Davison had, fraudulently, as against the plaintiff, conveyed the premises, to convey them to the plaintiffs, free from any incumbrance which he had put upon them. A certified copy of the judgment was served upon the defendant personally, and he was duly required to appear before the referee named in the judgment, at a specified time and place, and make the conveyance, under his direction.

The defendant did not appear before the referee, but, at the time and place specified, his counsel appeared, and offered to

read an affidavit of the defendant, in excuse of his non-compliance with that part of the judgment which required him to convey, showing that subsequently to the contract of sale to the plaintiffs, but prior to the commencement of this suit, he mortgaged the premises for $5,000, which mortgage, prior to the said judgment, was foreclosed and the premises sold, for which reason the defendant was unable to convey the premises to the plaintiffs.

The referee refused to receive the affidavit as an excuse, and demanded a compliance with the judgment, which was refused. He then made his report to the court, showing the non-compliance of the defendant with the requirement of the judgment, and the reasons therefor set forth in said affidavit. Afterwards the plaintiffs obtained from a justice of the court, at chambers, an order requiring the defendant to show cause at a special term "why an attachment should not be issued against him, and he be punished for his alleged contempt or misconduct in not having conveyed," &c. This order was founded upon the judgment entered in the action, the summons and underwriting of the referee requiring the defendant to appear before him and convey, the affidavit of service thereof with a certified copy of the judgment, and the report of the referee; and it contained a direction *that it be served on the defendant's attorney. It was so served, but no service was made on the defendant personally.*

At a special term, at which the order was returnable, upon reading the judgment roll in the action, together with the papers on which the order to show cause was granted, and the order to show cause, with the admission of service of the same upon the defendant's attorney, and after hearing counsel for the respective parties, the court adjudged the defendant guilty of a contempt of court in wilfully neglecting and refusing to comply with the terms and provisions of the judgment, and ordered that he be committed to the common jail of the city and county of New York, and there be closely confined and kept until he should comply with the requirements of the judgment.

The defendant was subsequently arrested upon a precept issued pursuant to the order, and committed to jail.

He then made a motion to set aside the order under which he was committed, and to be discharged from imprisonment, which motion was founded upon the papers on which that order was based, together with affidavits showing that he had no personal knowledge of the order to show cause above mentioned, until after the granting of the order directing his imprisonment. In opposition to the motion, affidavits were read on the part of the plaintiff showing that after the referee had reported, and even nine months before the granting of the order to show cause, an order had been made, without any direction as to its service, and after diligent search, the plaintiffs were unable to make personal service thereof; also controverting the fact stated in defendant's affidavit of his want of knowledge of the last order to show cause. This motion was denied at the special term.* The general term on appeal reversed the order denying the motion and discharged the defendant from imprisonment.† It is from the order of the general term thus made that this appeal is taken.

Was there any such irregularity or defect in the granting of the order under which the defendant was arrested and imprisoned as to require that it be set aside? By the first section of title thirteen, chapter eight, part three, of the Revised Statutes, entitled, "Of proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions" (2 *Rev. Stat.*, 1 *ed.*, 534), provision is made that every court of record shall have power to punish by fine and imprisonment, or either, parties to suits and others for any disobedience to any lawful order, decree or process of such court, whereby the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded or prejudiced. And by section 285 of the Code it is provided that when a judgment requires the performance of any other act than the payment of money, a certified copy of the judgment may be served upon the party against whom it is given,

* The decision at special term, denying the motion to discharge defendant, is reported, 12 *Abb. Pr.*, 385.

† The decision at general term reversing that made at special term is reported, 37 *Barb.* 97.

or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt. It is plain, then, that the defendant, upon refusing to obey the judgment, was guilty of misconduct, which made him liable to be proceeded against as for a contempt.

Two methods of proceeding against a party for such misconduct are provided for by section 5 of the statute in relation to contempts, above referred to, which are as follows:—The court shall either grant an order on the accused party to show cause, at some reasonable time therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party and to bring him befor such court to answer for such misconduct.

If the proceeding by attachment is adopted, the accused is to be arrested and brought personally before the court, unless he gives a bond with sureties to appear on the return of the attachment, and abide the order and judgment of the court thereupon (§ 12), and when he is brought into court upon the attachment, the court must cause interrogatories to be filed, specifying the facts and circumstances alleged against him, and requiring his answer thereto. (§ 19). Under this mode of proceeding, no order for punishment for the misconduct by fine or imprisonment can be made unless the party accused shall have been brought personally into court upon the attachment, or shall have voluntarily appeared therein; but in default of his being so brought in or so appearing, the court either awards another attachment or orders the bond taken on his arrest, prosecuted.

If the other mode of proceeding is adopted, there is no specific direction in the statutes in regard to the manner in which the order to show cause shall be served, or as to the cause of proceeding after service, except that section 3 provides that when the misconduct is not committed in the immediate view or presence of the court, the court shall be satisfied by due proof, by affidavit, of the facts charged, and shall cause a copy of such affidavits to be served on the party accused, a reasonable time to enable him to make his defence.

The mode of proceeding adopted in the case at bar was by

serving upon the defendant's attorney the order to show cause, with the affidavits upon which it was granted.

The learned judge who gave the opinion of the general term in the court below, held that personal service in such cases is indispensable; basing his opinion on the well-settled principle of the common law, that no person shall be condemned unheard. If we keep in mind the distinction between proceeding to punish criminal contempts and proceedings as for contempts to enforce civil remedies, we shall see the reason why personal notification of the accusation is, under the principle invoked by the learned judge, indispensable in the one case while it may not be in the other. Where the proceeding is to enforce a civil remedy, the party in default has already had the opportunity of contesting his liability to perform what the proceeding seeks to compel him to perform, and such proceeding is in effect but an execution of the judgment or order against him. There is, in the return of the proceedings as carried out in this case, no more reason for determining it as an infraction of the principle that no person shall be condemned unheard, than in every case where an execution may issue upon a judgment, against the person of the defendant. Judgment in an action for tort, for example, is obtained against a defendant, whereby he is condemned to pay the plaintiff a specific sum of money. In order to compel him to pay the money, he is liable to arrest and imprisonment, and this without any opportunity to show cause against it. It is the consequence of his non-payment of the money, which, after personal notice and the opportunity to contest the claim he has been adjudged to pay; he therefore is not condemned unheard. The execution against his person is in pursuance of the judgment which has been rendered against him by the court, after personal notice of the claim, and full opportunity to be heard against it. In reference to the right to be heard, the defendant in the case at bar occupies a similar position. His obligation specifically to perform the contract in question in the action has been established by the judgment, in regard to which he has been heard; and this proceeding is merely to enforce his fulfilment of that obligation. He can no more impugn the proceeding upon the ground of its contravention of

the great principle alluded to than if he were defendant in an execution against his person in an action of tort.

As has already been observed, the statute under which this proceeding was instituted does not specify in what way the order to show cause, with the affidavits on which it was founded, shall be served upon the party accused. When the proceeding is instituted by one party to an action against another, to enforce the performance of an order or decree, it is to be deemed, I think, a proceeding in the action, and all the papers are entitled in the action. (Stafford *v.* Brown, 4 *Paige*, 360; Brown *v.* Andrews, 1 *Barb.* 227.) Hence it was, doubtless, that the Chancellor, in Albany City Bank *v.* Schemerhorn (9 *Paige*, 372), said, "Where the party proceed by an order to show cause, copies of the order and of the affidavits, and other papers on which it is founded, must be served on the accused or his solicitor," &c. In Watson *v.* Fitzsimmons (5 *Duer*, 629), the plaintiff obtained an order to show cause why the defendant should not be punished for his misconduct in refusing to deliver his property to a receiver upon the return of the order. The defendant appeared and denied the alleged contempt, and the court made a further order referring it to a referee to take testimony and report whether the defendant was guilty of a contempt. The referee reported the defendant guilty, and upon his report, and all the prior proceedings, the plaintiff moved the court for an order adjudging the defendant guilty of the contempt. On the part of the defendant it was insisted that the court had no power to make the order of reference. The court, however, said: "This proceeding is one had in the action in which the judgment was recovered; and section 271, subdivision 3 of the Code, authorizes a reference in such a case;" and after adverting to the two modes of procedure, by order to show cause and by attachment, the court said, "the statute is silent, where the first mode named is adopted, as to the course to be thereafter pursued, whether the defendant appears or fails to appear. It may therefore be such as conforms to the general practice of the court, upon any order to show cause, why relief should not be granted. The proceeding was held regular, and the decision was affirmed by

the general term, and as appears by a statement in 10 *Bosw.*, 697, was subsequently affirmed by this court.

In the case at bar, it is correct, I think, to say that the proceeding was one taken in the action. The judgment remained unexecuted, and the court was proceeding in the mode prescribed by the statute to execute its judgment. The order to show cause, provided for by the statute, in the absence of any statutory provision to the contrary, was, then, governed by the practice of the court in regard to orders to show cause, both in respect to its service and to the further proceedings upon it. That according to such practice an order to show cause may be served upon the attorney of the defendant, will not be denied. Indeed that is the mode of service of all papers in the action prescribed by the Code, except the summons or other process, or any paper to bring a party into contempt (Code, §§ 417, 418). The papers in this case which brought the party into contempt, were the certified copy of the judgment and the summons and underwriting of the referee, requiring the defendant to appear before him and make the conveyance. These were personally served, and the defendant by his refusal to comply with them was brought into contempt.

The learned judge, who gave the opinion in the court below, has referred in support of his position that personal service of the order is indispensable, to the provision of the statute on the subject of criminal contempts (2 *Rev. Stat.*, 1 *ed.*, 278, § 12), requiring personal service, as follows: "Contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases, the party charged shall be notified of the accusation, and have a reasonable time to make his defense." But the succeeding 14th section is as follows: "Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for a contempt, for the purpose of enforcing any civil right or remedy."

The order to show cause is in effect but a notice of motion, and according to the practice of the court may ordinarily be served upon the attorney of the adverse party. Although in this case the judgment was entered in May, 1856, and the order to show cause was made and served on the defendant's

attorney on December 9th, 1857, yet, inasmuch as it appears that the defendant had been avoiding the service of a prior order to show cause, and that, after service of the second order, by the direction of the court, upon the attorney, and before the granting of the order on which the defendant was arrested and imprisoned, he consulted with his said attorney, and has not denied that the attorney was authorized to appear for him and oppose the granting of the order for his arrest and imprisonment, and as he did appear, it must be clear that the attorney is to be regarded as the defendant's attorney when the service was made, and that the service of the order to show cause was, in all respects, sufficient. (Drury *v.* Russell, 27 *How. Pr.*, 130).

Another ground stated in the opinion of the court below for the reversal of the order of the special term was that, in the order to show cause, the defendant was required to show cause "why an attachment should not be issued against him, and he be punished for his alleged contempt and misconduct in not having conveyed," &c.; while the statute does not authorize an order to show cause why an attachment should not issue, but only why the party should not be punished for the alleged misconduct. If the order required of the defendant more than the statute allowed, that would not make it void as to the requirements which the statute does allow, and the suggestion that it might have misled the defendant to suppose that only an attachment would be applied for, and that he would have an opportunity when brought into court upon the attachment to answer the accusation made against him upon interrogatories, is one which I think insufficient to justify a reversal of the order of the special term, since there is no pretence by the defendant that he was so misled.

As another ground for its order of reversal, the general term is inclined to the opinion that even in this case it was necessary to file interrogatories, and that the order of commitment was not warranted until the defendant had been given the opportunity, upon interrogatories, to purge his contempt. The statutes cited, with what has already been said in regard to them, show, I think, that when the proceeding is by an order to show cause, no interrogatories are necessary, and such was

the opinion of this court in Bush *v.* Lee. (MS. opinion. Case decided June Term, 1867.)

A further ground for the decision of the general term, put forth in the opinion, is, that inasmuch as the defendant was never personally before the court in this matter, the court had no jurisdiction of his person, and therefore the order for his arrest and imprisonment was unauthorized and void. If the proceeding is to be regarded as one in the action, as I have endeavored to show it is, then, clearly, this ground is not well taken. The court having obtained jurisdiction of the person of the defendant in the action, retains that jurisdiction for all purposes of enforcing the judgment, until its requirements are fully performed and executed. It is obvious, also, that the excuse suggested for non performance of the requirements of the judgment could not be regarded by the court as an excuse, for that would be permitting the party to set up, as such excuse, matter which the defendant should have set up against the rendering of the judgment. After judgment has passed against him, no matters which would have constituted a defence to the judgment, and which, if in due time and manner, brought before the court would have prevented it, can be allowed as reason why it should not be enforced.

I am of the opinion that the order of the general term reversing the order of the special term is erroneous and should be reversed.

All the judges concurred.

Order reversed.

ROSE *against* THE UNITED STATES TELEGRAPH COMPANY.

New York Superior Court; General Term, May, 1867.

ACTION AGAINST TELEGRAPH COMPANY.—PARTIES.

It seems that an action may be maintained against a telegraph company by the *receiver* of a message, for indemnity for a liability incurred by him in consequence of an error occurring in the message, through fault of the company in transmitting it; such right of action being founded not on *contract*, but on the *misfeasance* of the company, and their consequent liability for the natural and proximate consequences of their neglect.

But such action can only be maintained by one who has in his own right incurred the liability for which he seeks reimbursement. It does not lie in behalf of one who acted as a mere agent, and has voluntarily paid a demand for which his principal and not he, was liable.

T. & Co. sent a message by the defendants' telegraph, to the plaintiff, a broker, directing him to sell for them *five hundred* barrels, &c. The defendants transmitted the message reading *five thousand* barrels; and the plaintiff, on the faith of it, made contracts on behalf of T. & Co. for the sale of that quantity. T. & Co. repudiated the contracts. The article rose. The plaintiff paid the difference to the purchasers, and sued the telegraph company to recover the amount, and his commissions on the sale. *Held*, that the plaintiff having acted as agent only, was not liable upon the contracts and was not the proper party to recover the loss from the company.

Appeal from a judgment on a verdict.

In August, 1865, Tack, Brothers & Co., residing and doing business in the city of Philadelphia, delivered to the defendants at their office in that city, a telegraphic dispatch, addressed to the plaintiff at the city of New York, directing him to contract to sell for them *five hundred* (500) barrels of petroleum, at fifty one and a half cents a gallon, deliverable from September first to September fifteenth; sellers option; and requested an immediate reply. The defendants transmitted the telegram in all respects as it was written, except that as delivered to the plaintiff, it was written "*five thousand barrels*," instead of "*five*

hundred barrels." On delivery of the telegram the defendants demanded of and the plaintiff paid to the defendants the sum of seventy-five cents therefor. Within an hour of the receipt of the telegram, and in pursuance of it, the plaintiff made contracts with different persons, to sell and deliver to them *five thousand barrels* of petroleum, deliverable at the option of the seller, from September first to September fifteenth, at fifty-one and a half cents a gallon. Thereupon the plaintiff forthwith sent a telegram to Tack, Brothers & Co., stating that he had made such contracts, and received a reply, that in the dispatch which they had sent, they had directed the sale of five hundred and not five thousand barrels; and they refused to furnish or deliver any greater number than five hundred barrels; and also refused to ratify any of the contracts made by the plaintiffs in excess of the number mentioned in their dispatch. After the contracts were made and before the error in the dispatch was discovered, the price of petroleum advanced one and a half cents a gallon, and on the fifteenth of September had advanced to fifty-eight and a half cents a gallon. The plaintiff claimed that he was liable upon his several contracts to the parties concerned, and demanded judgment against the defendants for a sum which should cover such liability, and also his commissions.

On the trial before Mr. Justice JONES and a jury, it was proved that the plaintiff had paid two bills amounting together to $2,700 for the difference as expressed in "oil bought of Messrs. Tack, Brothers & Co., of Philadelphia, August 26, 1865."

The defendants moved for a nonsuit on several grounds. The motion was denied, and they excepted.

Upon the facts as proved, the court instructed the jury to find a verdict for the plaintiff for the difference between the contract and market price of the petroleum, and also for his commissions, the amounts of which were agreed upon. To this instruction the defendants excepted; and they now appealed from the judgment entered on the verdict.

G. P. Lowery, for appellants.

J. E. Parsons, for respondent.

*By the Court**—MONELL, J.—It does not appear that the contracts made by the plaintiff for the sale of five thousand barrels of petroleum were put in evidence on the trial. It therefore does not appear in whose name the contracts were made. There is no allegation in the complaint that the plaintiff made the contract in his own name, and if anything can be inferred from the tenor of the receipts taken as settling the contracts, the sales were made either in the names of Tack, Brothers & Co., or their relation as sellers was disclosed to the purchasers.

I am not prepared to say, that irrespective of a liability arising purely on contract, a telegraphic company may not be responsible to a third person, for the injurious consequences of an error in transcribing and transmitting a telegraphic message to such third person. If, upon the faith of a message thus communicated, the receiver enters into contracts or makes engagements which result in loss to himself, which loss is wholly occasioned by errors in the message, as transcribed and sent, and which errors were negligently made by the telegraphic company, it would seem that a liability should attach, not on the ground of the violation of a contract, but of the violation of a duty, the faithful discharge of which the company had undertaken. A mere gratuitous offer to perform a service for another imposes no legal obligation to perform such service; but if performance is undertaken and it is done negligently or without due care, so that an injury ensues, an action will lie, by the person injured. (Thorn *v.* Deas, 4 *Johns. R.*, 84.) Upon principles, therefore, analogous to the case last cited, any person injured by the negligence of a telegraphic company in transmitting a message, although neither a party or privy to any contract with such company, can sustain an action for his damages, for when "one does a legal act in such a careless and improper manner, that injury to third persons may probably ensue, he is answerable in some form of action, for all the consequences which may directly and naturally result from his conduct." (Vandenburgh *v.* Fuax, 4 *Den.*, 464.)

It is not claimed in this case, either that the plaintiff was a

party to, or that there was any privity of contract between himself and the defendants. Their contract was with Tack, Brothers & Co., and for a breach of such contract they are liable only to the latter; and the right, therefore, to maintain this action by the plaintiff rests solely upon the principle before stated, of a wrong and an injury; and to bring himself within the principle, he has endeavored to show that, in legal contemplation, he was the injured party. The case shows that upon being informed of the contracts to sell five thousand barrels, Tack, Brothers & Co. refused to ratify such contracts or to furnish or deliver any greater number than five hundred barrels; upon which the plaintiff, assuming his liability to the purchasers of the five thousand barrels, closed the contracts, paying to the purchasers the difference between the market and contract price.

If the plaintiff was correct in such assumpsit of liability he can doubtless sustain this action.

All the parties to the transaction immediately connected with the error of the telegraph company, held the relation of principals and agents. Tack, Brothers & Co. were the common principals in Philadelphia, who desired to sell; the defendants were their agents authorized to transmit their instructions to the plaintiff, who, as their broker, was directed to sell. And nothing in any of the subsequent transactions of the parties changed such relation of principal and agent. The plaintiff, therefore, acting as the broker of Tack, Brothers & Co. to negotiate a sale, not having the property in his possession, could not by making sales in his own name affect their rights as sellers (*Story on Sales*, § 85), for nothing is better settled than that a principal is entitled to the same rights and remedies against the purchaser, whether the contract be in his name or in the name of his broker. (*Story on Sales*, § 88, 89.) And hence, so far as such rights and remedies go, it is not immaterial whether the sales in this case were made in the plaintiff's name, or in the names of his principals, as in either case they were the contracts of Tack, Brothers & Co. and not of the plaintiff. *Qui facit per alium facit per se.* For, says Parsons (2 *Par. on Con.*, 250), a "broker being one to whom goods are not entrusted, and who usually and properly sells in the

name of his principal, and who is understood to be only an agent, whether he sells in his own name or not, stands only on the footing of an agent." It does not, however, by any means follow, that an agent who does not disclose his principal is not liable to the person with whom he contracts. If he conceals his character of agent, he then becomes a principal, and individually liable upon his contracts, but the party dealing with him may, when he discloses the principal, charge either, at his election. (Beebe *v.* Robert, 12 *Wend.*, 413.) But I do not propose to pursue this branch of the subject further, for it does not appear that the plaintiff made the contract in his own name, and it does sufficiently, I think, appear that he disclosed his principals, and thereby relieved himself from personal responsibility. It is not, then, disputed that the plaintiff was the mere agent of Tack, Brothers & Co. and was acting for them and on their behalf. Nor can it be disputed, that having disclosed his principals, they and not he were liable, upon any contracts which he made in pursuance and within the scope of his agency.

The principals in Philadelphia in prosecuting their business and in communicating with their agent in New York employed the defendants to transmit their message. Upon receipt of the message, the agent, obeying his instructions and disclosing his principals, made contracts for the sale of five thousand barrels of petroleum. Can it be successfully contended that the principals were not liable on such contracts, merely (and there can be no other reason) because the defendants, their (*quasi*, at least) agents, had negligently transmitted their message, and by a mistake directed a sale of a larger quantity than was intended? I think not. A vendor is bound by all the acts of his broker done within the limits of his authority (*Story on Sales*, § 90), and it can make no difference whether the authority proceeds directly from the principal, or indirectly through another agent.

Suppose Tack, Brothers & Co. had directed one of their clerks to communicate to the plaintiff by letter to sell five hundred barrels, and the clerk had negligently written five thousand barrels, and the plaintiff had contracted to sell the latter number, would not such be the contract of and binding

upon Tack, Brothers & Co.? Clearly it would. Nor is there any difference in the two cases. The authority to the agent coming through the telegraph company or through the clerk, so far as the protection of the agent is concerned, is the same. Whatever errors or mistakes were committed by the medium employed by the principals to transmit their instructions to their agent, can in no way, it appears to me, affect either the duty or the right of such agent literally to obey their injunctions, and to throw all responsibility from himself upon them.

Not only were the contracts made by the plaintiff obligatory upon his principals in Philadelphia, to the full extent of five thousand barrels, but in like manner, such principals were liable to the plaintiff for his accustomed commissions and expenses (including the seventy-five cents for the telegram), in effecting the sale, and which could have been recovered in an action for such purpose. Any payment therefore made by the plaintiff in settlement of the contracts was voluntary, and was made merely on behalf and for the benefit of Tack, Brothers & Co., and does not give any right of action whatever to him against these defendants. His only remedy being, if any, against his principals to recover for money paid.

In Wash. & New Orleans Tel. Co. *v.* Hobson, in the Court of Appeals in Virginia (15 *Gratt.*, 122), an order to buy five hundred bales of cotton was altered to twenty-five hundred; and in an action by the sender of the message against the company it was held he might recover not only his damages but also the commissions due to his factor.

We were referred to one case only in opposition to the views I have here expressed. In that case (N. Y. & W. Printing Tel. Co. *v.* Dryburg (35 *Penn.*, 298), the order transmitted was: "Send me, for Monday evening, two hand bouquets;" which was transmitted, two hundred bouquets; and it was held, that the receiver of the message, having commenced filling the order before the mistake was discovered, could maintain an action. Judge SHARSWOOD, in an opinion delivered below, admitted, that if the company were to be regarded as the agent of the sender, it was clear they were not liable to an action by the receiver. But he did not regard them as such agents for reasons which, to my mind, are not very satisfactory. Yet

Judge WOODWARD, when the case was up on appeal, said: "that the relation of principal and agent existed between Le Roy, the sender, and the company, there can be no doubt; but I do not think it equally clear that that relation was not established between the plaintiff and the company. Telegraph companies are in some sense public institutions; and I am inclined to think the company ought to be regarded as the common agent of the parties at either end of the line." But the error in transmitting the message was regarded as a misfeasance, and the company held responsible as a wrong doer. The case is unsupported by authority, and is, it seems to me, opposed by well settled principles applicable to the relations of principal and agent; and I cannot therefore regard it as more than a mere *dictum*, emanating, it is true, from a court entitled to much respect, but not binding upon us here.

The examination I have given this question has led me to the conclusion, that treating the mistake of the company as a misfeasance, and extending their liability to every person injured by the wrong, which is the extent to which any of the cases go, the plaintiff in this case was not the injured party; that he was not responsible, individually, upon any of the contracts he made; that Tack, Brothers & Co. were alone liable on such contracts, as also for the plaintiff's commission and expenses, and that the settlement of such contracts by the plaintiff, did not, in contemplation of law, make him the injured party.

I am of opinion the judgment should be reversed and a new trial granted with costs, to abide the event.

Order accordingly.

CONKEY *against* BOND.

Court of Appeals; March, 1867.

RIGHTS OF PRINCIPAL.—JUDGMENT AGAINST AGENT.

It is a fraud in law for one who is an agent to purchase for another, to fill the order with property of which he is owner, concealing the fact of his ownership; and the principal on discovering the breach of confidence, is entitled to rescind.

The facts that the agent acted without compensation, and without intent to defraud, and made no false representations, are immaterial.

It appearing, on appeal, in an action to rescind such a sale, that the agent, without his principals' knowledge, sold as owner, what he bought as agent, a judgment dismissing the complaint will be set aside, and judgment absolute, for the plaintiff (the principal), ordered.

Appeal from an order of the Supreme Court.

This action was brought to rescind a sale of stock in the Oswego Starch Company, made by the defendant to the plaintiff, in February, 1857, and to recover $1,500, the price paid therefor, and certain payments made by the plaintiff as a stockholder.

The complaint alleged in substance, that the defendant undertook to purchase stock in the company, as the plaintiff's agent, and that he fraudulently transferred stock of his own to the plaintiff, at a price greatly exceeding its value, under the pretence that it was the stock of other parties, which he had purchased for the plaintiff, as his agent; that he concealed this fact from the plaintiff, and upon its discovery by the latter, shortly before the commencement of the action, refused to rescind the sale. The complaint further alleged that the defendant made false representations to the plaintiff as to the value of the stock and the financial condition of the company, to induce him to make the purchase; and charged that the sale was fraudulent in fact and in law.

The judge before whom the cause was tried found that no representations were made by the defendant which he knew to be false, and was of opinion that the other facts, established by the pleadings and proofs, did not entitle the plaintiff to relief.

These facts were substantially as follows:

In January, 1857, the defendant was the owner of a number of shares of the Oswego River Starch Company, and was the agent of the company in the city of New York for disposing of its manufactures. In an interview at that date between the parties, in New York, after a favorable account by the defendant of the business of the concern (of which the plaintiff had previously no knowledge), the plaintiff expressed the desire to purchase some one or two thousand dollars worth of the stock, if any was to be obtained in the market, at a price not exceeding $150 per share. The defendant thereupon undertook to buy some, if it could be procured, and, if successful, to apprise the plaintiff, who resided in the county of Chenango. Accordingly, on January 31, 1857, he addressed a letter to the plaintiff, reiterating his opinion of the value of the investment, stating that he knew where he could obtain the shares at $150 per share, and asking defendant if he would like it. He stated further, that he did not wish to advise the plaintiff, but if he should conclude to take the stock he would "get and send him a certificate" for that amount. The plaintiff answered this letter on the 5th of February, remarking that he liked the statement, and was willing to take that amount, and desiring the defendant to obtain the certificate, when he would at once put him in funds. This letter the defendant acknowledged on the 19th by a brief note, saying that he would write and get the certificate as soon as possible; and on the 25th of February he wrote again, enclosing the plaintiff the scrip for ten shares of the stock, and adding, in a postscript: "If we meet with no mishap, I think our stock will pay well; I could sell quick at $150, if I had any to dispose of." The plaintiff remitted the $1,500, and that closed the transaction.

The defendant did not, in fact, purchase any stock from the company, or from any outside party, but caused ten shares of his own stock to be transferred to the plaintiff. He did not

communicate this fact to the plaintiff at any time during the negotiation, or subsequently; and it was not discovered until the following June. At the time of the transfer the company was in an embarrassed condition, and the stock was of little intrinsic value, though these facts were unknown to the defendant, and he supposed the representations to be true which he had made in this respect to the plaintiff. The affairs of the company were soon after wound up, and its effects passed into the hands of a receiver.

The complaint was dismissed, but the judgment was reversed and a new trial ordered by the general term in the Fifth District. The case, as decided in the Supreme Court, is reported in 34 *Barbour*, 276.

William F. Allen, for appellant.

Lewis Kingsley and *Benjamin F. Rexford*, for respondent.

PARKER, J.—The fact that the defendant volunteered his agency, did not absolve him from the duty of fidelity in the relation of trust and confidence which he sought and assumed. The plaintiff was induced to purchase, at an extravagant premium, stock of the value of which he was ignorant, on the mistaken representations of the defendant, who professed to have none which he was willing to sell. This assurance very naturally disarmed the vigilance of the respondent; and he availed himself of the defendant's offer, by authorizing him to buy at the price he named. The defendant did not buy, but sent him a certificate for the amount required, concealing the fact that he had not acted under the authority given, and that the stock transferred was his own.

There is no view of the facts in which the transaction can be upheld. The defendant stood in a relation to his principal which disabled him from concluding a contract with himself, without the knowledge or assent of the party he assumed to represent. He undertook to act at once, as seller and as purchaser. He bought as agent and sold as owner. The ex-parte bargain, thus concluded, proved advantageous to him and very unfortunate for his principal. It was the right of the latter to rescind it, on discovery of the breach of confidence.

It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself, without authority from the plaintiff, was a constructive fraud, in view of the fiduciary relation which existed between the parties. In such a case, the law delivers the agent from temptation, by a *præsumptio juris et de jure*, which good intentions are unavailing to repel. It is unnecessary to state our views more fully on this question, as it is fully and ably discussed in the opinion delivered by Judge BACON, in the court below; and his conclusions are abundantly fortified by authority. (Gillett *v.* Peppercorne, 3 *Beav.*, 78; *Story Ag.*, § 214 Michoud *v.* Girod, 4 *How. U. S.*, 555; Davoue *v.* Fanning, 2 *John. Ch.*, 268–270; Moore *v.* Moore, 5 *N. Y.* [1 *Seld.*], 262; N. Y. Central Ins. Co. *v.* National Protection Ins. Co., 14 *N. Y.* [4 *Kern.*], 91; Gardner *v.* Ogden, 22 *Id.*, 347.)

The objection that this theory is inconsistent with that stated in the complaint is not sustained by the record. The essential facts are alleged, and the appropriate relief is demanded. The fact that the complaint alleged other matters which the plaintiff failed to establish impairs neither his right nor his remedy. *Utile per inutile non vitiatur.*

The order of the Supreme Court should be affirmed, with judgment absolute for the respondent.

All the judges concurred.

Judgment accordingly

FERRIER *against* THE AMERICAN GLASS SILVERING COMPANY.

New York Superior Court; Special Term, January, 1868.

ATTACHMENTS.—CORPORATIONS.

The Code of Procedure does not authorize the issuing of an attachment as a provisional remedy against a *domestic* corporation.

The various sections of the Code governing attachments, construed.

Motion to vacate an attachment.

MONNELL, J.—The defendant in this case is a corporation created by or under the laws of this State, and an attachment against its property has been granted on the ground of a fraudulent disposition of its property.

The motion is to vacate and set aside such attachment.

I have not been able to find any provision in the Code which authorizes the issuing of an attachment against a *domestic* corporation. The question is new, and has not, that I am aware, been adjudicated upon.

If the power to grant attachments against property, which is given in terms by section 227 of the Code, was confined to that section, it might be interpreted to embrace domestic as well as foreign corporations; for although it declares that in actions, &c., "against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself," the plaintiff may have the defendant's property attached; yet it also provides, that "whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud

creditors," &c., an attachment in like manner may be issued. There therefore seem to be, not only two classes of defendants, but two classes of cases, subject to the provisions of that section: (1) Foreign corporations and non-resident, absconding, or concealed defendants, in the one class; and (2) persons and corporations doing or intending to do some of the acts specified to defraud creditors, in the other class. The term "corporation," where it occurs the second time in the section, unlike its occurrence in the first part, is not, apparently, restricted or confined to foreign corporations, but is general; and if the section stood alone, might well be construed to mean any corporation; and strength, therefore, would be given to such construction, by the fact that the property of a foreign corporation can be attached as of course, and without any allegation of a fraudulent disposition of it, whereas the property of other corporations, necessarily including such as were created by or under the laws of this State, can be attached only on proof of an intention to defraud creditors: thus rendering the use of the term "corporation" in the second branch of the section unnecessary, unless it was the intention of the legislature to apply the section to such latter corporations. I should yield to this construction were there not other parts of the Code which seem to me to wholly destroy the inference.

Although the section referred to specifies the case in which attachments may issue, and apparently includes domestic corporations, yet the requisite proof to obtain their issue is prescribed in section 229. That section provides that "the warrant may be issued whenever it shall appear, by affidavit, that a cause of action exists * * * and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or that such corporation or person has removed, or is about to remove, any of his or its property from this State, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this State or not."

It will be seen that in this section, which prescribes the manner and substance of the proof required, the words "such corporation" is employed, which necessarily, it seems to me, refers to the foreign corporation in the beginning of the section, and not to the term "corporation" in section 227. It would be difficult, I think, to discern a satisfactory reason for the change or difference of designation in the two sections, unless upon the supposition that the direct and immediate reference intended by the word "such" was deemed more important in the section which prescribes the nature of the proof required, than in the section which designates the cases in which attachments may be issued; or that it was omitted, through oversight or mistake, from the first section.

It cannot be said, in reference to section 229, that the apparent or seeming want of any necessity in section 227 for a further provision for attachments against foreign corporations or non-resident defendants being required (inasmuch as their property can be attached without proof of a fraudulent intent), is a reason for the belief that the legislature intended the latter proof to apply to domestic corporations or residents of the State only; for the latter clause of section 229 in express terms authorizes the issuing of attachments, upon proof of a fraudulent intent, "whether such defendant be a resident of this State or not;" thus clearly including non-residents among those whose property may be attached, upon proof of its fraudulent disposition, notwithstanding an attachment may be issued upon proof of non-residence merely.

This accumulative proof, so seemingly unnecessary in the case of non-residents, aids us in getting at the intention of the legislature, which would seem to have been that the property of foreign corporations only, was to be made liable to seizure on attachment; for otherwise the word "such" would have no significance. It seems to me, therefore, that not only the literal reading, but also the fair interpretation of the two sections taken together, is that foreign corporations only were intended to be subjected to the law of attachments in actions.

There is another section which strengthens the view I have taken of this question. Section 239 provides that "if the *foreign* corporation, or absent, or absconding, or concealed de-

fendant, recover judgment against the plaintiff in such action," &c., the sheriff shall deliver the property attached, or the proceeds, to the defendant; that the warrant be discharged and the property released from the attachment. In that section corporations other than foreign are not mentioned, and no provision is made for a judgment in favor of a domestic corporation; thus leading to the conclusion that such corporations were not included in the class mentioned in the previous sections.

Under the Revised Statutes, attachments against pro ɾe were allowed only against foreign corporations and absconding, concealed, or non-resident debtors (2 *Rev. Stat.*, 1, 459); and therefore the provisions of the Code extending such provisional remedy to debtors who had fraudulently disposed of their property, is new.

It may be, that in excluding corporations existing under the laws of this State, the legislature had in view the power which the Revised Statutes has given to the courts (2 *Rev. Stat.*, 462, § 33, *subd.* 7–8), to set aside alienations of property, made by trustees or other officers of corporations for purposes foreign to the lawful business and objects of the corporation; and to restrain and prevent any such alienations, in cases where it may be threatened; and that such power was regarded as a sufficient remedy and protection to creditors, without extending to them the remedy which the Code provides.

I have referred, I believe, to all the provisions of the Code which can aid in determining the question presented upon this motion; and their examination has satisfied me that they do not authorize the property of corporations created by or under the laws of this State to be attached.

The motion to set aside the attachment must, therefore, be granted.

CHRISTY *against* LIBBY.

New York Common Pleas; Special Term, February, 1867.

APPEAL FROM ORDER.—STAY OF PROCEEDINGS.

An appeal from an order overruling a demurrer, does not operate, by itself, as a stay of proceedings.

A stay may be granted by the court; but in ordinary cases only, upon terms of defendant giving security.

Motion for a stay of proceedings.

This action was brought by Harriet E. Christy, as administratrix, against James S. Libby. The defendant demurred to the plaintiff's complaint. The demurrer was overruled at special term, and an order entered giving the defendant twenty days in which to answer on payment of costs. The defendant appealed to the general term from the order overruling the demurrer, within the twenty days provided for in the order. The plaintiff, after the expiration of the twenty days, gave notice of an application for judgment. The defendant now applied for an order staying the plaintiff's proceedings, claiming that the appeal from the order operated to stay the judgment on the merits until the issue of law was disposed of.

Amos G. Hull, for the motion.

C. Bainbridge Smith, opposed.

BRADY, J.—The appeal in this case, on the part of the defendant, is one from an order under the provisions of section 349 of the Code (Phipps *v.* Van Cott, 4 *Abb. Pr.*, 90), and such an appeal does not operate *per se* as a stay of proceedings. (Hicks *v.* Smith, 4 *Abb. Pr.*, 285, and cases cited; Ferry *v.* The

Bank of Central New York, 9 *Abb. Pr.*, 100; Genin *v.* Chadsey, 12 *Abb. Pr.*, 69.) The order overruling a demurrer is not an exception to the rule. The case of Stewart *v.* The Saratoga and Whitehall Railroad Co. (12 *How. Pr.*, 447), in which a distinction was made between such an order and others, was overruled in Hicks *v.* Smith, and for reasons which are approved. If the defendant does not answer during the period allowed for that purpose, the plaintiff would be entitled to judgment. The appeal from the order delays the plaintiff's recovery until it is submitted to and decided by the general term, which would, in effect, extend the period allowed to serve the answer, thus substantially nullifying the order requiring it to be put in within the time named. The appellant, by his own act, therefore, withholds from the plaintiff the right to the effective power of the court. A stay of proceedings might also jeopardize the collection of the demand, and should not, as a general rule, be granted without security. If the general term affirm the order appealed from, but give to the appellant liberty to answer, the bond given ceases to exist as a liability, either of surety or principal, unless otherwise provided by the bond. If the leave should be withheld and an appeal be taken to the court of appeals, a stay would follow if the security required by statute in such cases were given.

In this case the defendant received the money claimed to be due, as a collector, and though he sets up jurisdiction over him in another tribunal, he is held to answer in this action by the deliberate judgment of this court. Under such circumstances the stay should not be ordered without security, and such must be the result of this motion. I think the defendant should give a bond in $5,000, conditioned that the defendant will pay any sum that may be recovered in this action, if the order appealed from be affirmed, and the defendant be not granted leave to answer and does not appeal from the general term of this court to the court of appeals within thirty days after such decision.

KINNIER *against* KINNIER.

Supreme Court, First District; Special Term, March, 1868.

COMPLAINT FOR DIVORCE.—FRAUDULENT JUDGMENT.

A complaint filed to procure a marriage declared void, charged that when defendant married plaintiff, she had a husband living; that she represented to the plaintiff that she had procured a divorce from such former husband; but that the divorce was void for fraud and collusion practiced in procuring it.

Held that the complaint was insufficient to warrant an action. If the parties to the former marriage colluded to procure the divorce, it was binding upon each of them; neither could impeach it; and the second marriage was valid, as against them both, and consequently binding on the plaintiff.

Demurrer to complaint

The action was brought by husband against wife to have a marriage declared void The complaint averred that the defendant was married in Massachusetts, in 1848, to one Pomeroy. In 1855, Pomeroy, with intent to evade the laws of Massachusetts, went to Chicago to procure a divorce, for causes which were not recognized by the laws of Massachusetts, and commenced a suit for that purpose. The defendant went to Chicago, and appeared in said suit, and put in an answer. The plaintiff put in no replication, as he was bound to do by law, whereby the answer stood confessed. The parties, by collusion, on September 19, 1855, procured to be entered and docketed a formal decree of absolute divorce. The complaint charged that this decree was fraudulently procured by unlawful collusion, and was a nullity by the laws of Massachusetts and Illinois.

It also alleged that on June 28, 1861, the plaintiff and defendant did attempt to contract a marriage; the defendant representing that she had been divorced.

The prayer for relief, was that the Illinois decree might be

adjudged to be fraudulent and void, and the attempted contract of June 28, 1861, to be a nullity, and never to have had any legal existence; and that the defendant might be barred from dower.

Two grounds of demurrer were assigned; 1. Want of jurisdiction; 2. Insufficiency of the complaint.

Clarence A. Seward, for the demurrer.

I. This action can only proceed under the provisions of the Revised Statutes (2 *Rev. Stat.*, 142); apart from which authority this court has no jurisdiction to annul a marriage. (Burtis *v.* Burtis, *Hopk. Ch. R.*, 559; Pugnet *v.* Phelps, 48 *Barb.*, 566; Jarvis *v.* Jarvis, 3 *Edw. Ch.*, 462.)

II. The plaintiff has sued the defendant by his name, and as his wife, thereby admitting the marriage contract, and cannot evade the statute by alleging that it was merely an "attempt." If the cause of action, therefore, is not within the provisions of the statute, this court has no jurisdiction over the case.

III. The complaint seeks to present two grounds of jurisdiction: 1st. Fraudulent representations by the defendant as to the validity of the Illinois divorce; 2d. The absolute illegality of the Illinois divorce, leaving in force the defendant's former marriage. The first ground is inconsequential and untenable. No representations as to the divorce could have induced the second marriage. The alleged representations are not of a kind which equity regards as constituting such fraud as requires the dissolution of the marriage contract. The frauds which equity relieves against are those which are perpetrated by force or duress, or those which concern property, or affect the rights of property. (1 *Day's Cases in Error*, 111; Clarke *v.* Clarke, 11 *Abb. Pr.*, 230.) Moreover, the complaint is defective in not averring, that since the plaintiff acquired knowledge of what he denominates a "fraud," there has been no voluntary cohabitation between the parties. (2 *Rev. Stat.*, 143, § 31.) And it does not appear where the second marriage was contracted, nor that at the place of contract it was void. This court has no power to annul a marriage contracted out of this State except in case of fraud. A contract

of marriage out of this State being assumed, its legality is presumed, and if legal at the place of contract, it is legal every where. (1 *Bish. Marr. & Div.*, § 355.) No fraud at the place of contract being averred, this court has no jurisdiction to annul the marriage.

II. The second alleged ground of jurisdiction also fails: 1. This court has no jurisdiction to set aside a judgment rendered by a court of record in a sister State. This suit concedes that the judgment is yet valid in Illinois. It is therefore within the constitutional protection as to its force and validity here. (*Const. U. S., Art.* 4, § 1; Bicknell *v.* Field, 8 *Paige*, 445; Westervelt *v.* Lewis, 2 *McLean*, 511; Bissell *v.* Briggs, 9 *Mass.*, 440; Rogers *v.* Rogers, 15 *B. Mon.*, 364.) 2. The validity of the judgment can be tested only by appeal in the suit in which it was rendered. (Bicknell *v.* Field, *supra;* Burlen *v.* Shannon, 3 *Gray*, 388.) 3. A judgment can only be declared void for the reason that the court by which it was rendered had no jurisdiction of the subject matter or of the parties. No such reason in this case has been assigned or exists. (Lane *v.* Bommelmann, 17 *Ill.*, 95.) 4. If the judgment was fraudulenly procured it cannot be impeached for that reason in this collateral action. (Tilford *v.* Barney, 1 *Iowa*, 575; The People *v.* Downing, 4 *Sandf. R.*, 193; Lamprey *v.* Nudd, 9 *Fost.* [*N. H.*], 229; Wesson *v.* Chamberlain, 3 *Const.*, 332). 5. The action of the court in this case may have been irregular in disregarding the answer, but it cannot for that reason be impeached by a stranger collaterally. (Maxwell *v.* Pittinger, 2 *Green.*, 156; Anderson *v.* Fry, 6 *Ind.*, 76; State *v.* Conolly, 6 *Ired.*, 243; Miller *v.* Barkeloo, 3 *Eng.*, 318; Brown *v.* Byrd, *Id.*, 384; Cropsey *v.* McKinney, 30 *Barb.*, 48; Bumsteed *v.* Reed, 31 *Barb.*, 669, and cases there cited; Barron *v.* Tait, 18 *Ala.*, 668; Mobley *v.* Mobley, 9 *Ga.*, 247; Wright *v.* Marsh, 2 *Greene*, 94; Ranoul *v.* Griffie, 3 *Md.*, 54; Mills *v.* Dickson, 6 *Rich.*, 487; Vanderpoel *v.* Van Valkenburgh, 2 *Seld.*, 190; Cyphert *v.* McClure, 22 *Penn.*, 195.) 6. But there was no irregularity in the rendition of the judgment. The question was one of rule and practice, and the judgment of the court is not weakened or vitiated by the error in practice.

IV. The complaint proceeds upon a mistaken view of the law. No court except the one rendering the judgment is competent to vacate it.

V. The cause of action as set forth in the complaint does not fall within any one of the four subdivisions contained in the statute. It is not for alleged minority. Nor on the ground that there is a former husband of the defendant now living, her marriage with whom is now in force. Nor that the plaintiff was an idiot or a lunatic. Nor that the consent of the plaintiff was procured by force or fraud.

The cause of action as it is disclosed by the relief now sought, is to declare that the Illinois divorce was illegal; that as a consequence the former marriage of defendant is in full force; that it was so in force when defendant was married to plaintiff although the divorce was then unreversed; that the former marriage being in force defendant has been guilty of bigamy; and thus by the decision in this suit a marriage which may have been lawfully contracted out of this State is made illegal. Morality and decency alike require that the court should refuse to exercise any jurisdiction or grant such relief in this case. (Pugnet *v.* Phelps, 48 *Barb.* 566; Singer *v* Singer, 41 *Id.*, 140.)

G. W. Parsons, opposed.

CARDOZO, J.—The allegation in the complaint that the parties resorted to Illinois to obtain a decree of divorce in fraud or violation of the laws of the place of their domicile, I think unimportant here. I can very well see how the State of Massachusetts might complain that its citizens had violated their allegiance to it, and how the courts of that State might disregard the judgment of another jurisdiction which granted a divorce to persons domiciled in the former State, who could not have obtained such a decree in the tribunals of that State. But I do not know of any principle, and have not been referred to any decision which sustains the doctrine that the courts of this State should thus protect the sovereign rights of Massachusetts. The complaint does not question the jurisdiction of the Illinois court over the subject matter, and it shows that

that tribunal acquired jurisdiction of the persons of the parties —of the plaintiff by his bringing the action, and of the defendant by her appearing and answering the bill. Whether the rest of complaint be deemed to charge in effect only that certain irregularities were had in the progress of the suit, or whether it sufficiently alleges that the parties practiced a fraud on the court and thus procured the decree, will not be material to determine. If the former be the true construction, then it is enough to say that mere irregularity could not affect the decree, and that the plaintiff here, a stranger to that litigation, cannot be heard to question the regularity of the proceedings of that suit. He may raise jurisdictional questions, but not mere points of regularity in practice.

If, however, the right view of the pleading be the latter one, above mentioned, and if the courts of this State can entertain a suit to annul the decree of a court of another State on the ground of fraud, yet this plaintiff is not in a position to ask any such relief. No one can claim to have a judgment or a deed avoided for fraud, unless it injuriously affects him, and such is not the case with this plaintiff. Giving the complaint the most liberal construction for the plaintiff, it charges that the representation upon the faith of which the plaintiff married the defendant was that she "had procured a valid divorce" from her former husband. In other words, that this plaintiff and she might lawfully be married. Now if this be true, the plaintiff has not been harmed by this deception, and even if the representation were inaccurate he will not be entitled to annul the marriage. The complaint does not dispute, but that if the decree of divorce stands, the defendant would be at liberty to marry, and that, therefore, must be assumed; but it avers that the parties to the divorce suit colluded together, and by such collusion fraudulently obtained the judgment. If that be so, neither of those parties could possibly avoid that decree. (*Bish. Marr. & Div.*, 706.) It is binding upon both of them, and the marriage between this plaintiff and the defendant was valid. Where both parties unite to practice a fraud, neither can be heard to seek relief against it; and as the plaintiff cannot be prejudiced if his marriage were lawful, he, a stranger, has no interest in the matter which would

authorize him to impeach the judgment for that fraud. That his feelings or prejudices might have revolted at marrying a woman under such circumstances, gives him no standing in court. (Clarke *v.* Clarke, 11 *Abb. Pr.*, 230.)

Without adverting to other views which lead me to think that this complaint cannot be sustained, enough has been said to show that, in my opinion, the demurrer is well taken, and that there must be judgment thereon for the defendant, with costs.

FISK *against* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

Supreme Court, First District; Special Term, January, 1868.

COMPELLING AFFIDAVIT.—PROPER PROCEDURE.

A party to an action, as well as any other witness, may be compelled to make an affidavit, under subdivision 7 of section 401 of the Code of Procedure.

A "fishing" examination is not allowable, under that section. An order for the examination can only be made upon proof that the affidavit of the witness is "necessary;" and to allege this, involves knowledge in advance of the facts to which the witness will testify.

The proper course, when an affidavit is desired, is, ordinarily, to draft an affidavit and submit it to the witness to be verified, before applying for an order.

But the objection that no affidavit has been prepared and submitted, may be waived: and it is waived, if, when asked to make affidavit, the witness does not require a draft to be submitted, but makes a general refusal to testify.

After a witness has refused to make affidavit, and an examination has been ordered, the court should not arrest it upon the ground that an affidavit has subsequently been tendered, unless it very clearly appears that such affidavit is full and frank.

No examination of books and papers is allowable, in the proceeding authorized by section 401 of the Code, subdivision 7.

Motion to vacate orders for taking examinations before a referee.

CARDOZO, J.—I am compelled, owing to the brief interval since the argument on Saturday, and the other judicial demands upon my time and attention, to content myself with merely stating, in general terms, the conclusions which I have reached:

1st. I think that a party to the action, as well as any other witness, may be obliged to make an affidavit under the 7th subdivision of section 401 of the Code.

2d. The section in question does not authorize a fishing examination, to ascertain whether a person may not know something material to be proven on the motion. Its remedies are afforded upon the theory that the applicant knows that some one can prove a necessary fact, and that that person refuses to make an affidavit voluntarily.

The affidavit must be "necessary," and the party cannot swear that it is so, unless he knows what facts the person whose deposition is sought can testify to. A party cannot, as has been attempted in this case, call upon a person, whether his adversary or a stranger, for information upon certain points to enable him to ascertan whether the affidavit of such person will be necessary. There is nothing in this statute, nor in any other, requiring any answer to be given to such a call for information.

3d. The right practice is, I think, to prepare and tender to the person whose deposition is desired an affidavit, and to request him to verify it.

I do not mean to say that this form is necessary as a matter of jurisdiction before the order can be granted, but I think it the right rule of practice which should govern this proceeding, and that generally that course should be pursued.

There is no hardship on the applicant in this rule, because he must know to what facts the person can testify, or he cannot say that the affidavit is "necessary for him." If he does not know any such fact, which he believes the person can prove, he should not be allowed to speculate about it, and the statute does not mean to enable him by its aid to ascertain it. If he does know of such facts, there can be no reason why he

should not prepare an affidavit, stating them, and present it to the witness and ask him to swear to it, so that the witness may understand just what is demanded of him.

I do not think that any of the consequences which the counsel for the plaintiff deprecated, would follow from this course.

If the party be deprived of any affidavit, because he does not know of any witness whom he believes can testify to what he deems necessary, then all that can be said is that his motion may fail, but he is in the same plight that every one is who has a just cause of action without adequate proof. The law has furnished no means by which he may examine persons to see if he can find some one who can prove what he may require to support his motion.

But if the witness decline to make the affidavit, the cour may compel him to do it; and certainly no court in the judicious exercise of the discretion which the statute confers, (for its language is wholly permissive), would hesitate to grant the order when it appeared that the witness not only refused to make the affidavit tendered to him, but though claiming that it was inaccurate in some particulars, declined to correct it. If the witness should satisfy the court either that he knew nothing of the subject matter of the affidavit asked of him, or that the affidavit tendered to him, was in its general scope and character false, then doubtless the court should not oblige him to testify, because it would be apparent that the real object was not to procure an affidavit of known facts, but under pretence of doing so, to examine the witness to ascertain whether he did or did not know anything necessary for the party; which this section of the Code was not designed to allow.

4th. The objection, however, that no affidavit has been offered to the person whose deposition is sought, may be waived; and I think it is waived, when the witness makes a general refusal to testify. If he means to invoke the strict rules of practice, he must place himself upon the objection when he is asked to testify.

He has the right to demand that an affidavit be submitted to him, and may take reasonable time to consider it and an-

swer whether he will swear to it or not, but if he makes a general refusal, then I think the objection that the affidavit was not presented to him when the request to swear to one was made, is waived.

5th. The whole matter rests in the discretion of the court, and therefore, after a refusal, or even after the examination has commenced, I think the court might deny an application or vacate an order, if one had been granted, to oblige the person to make the deposition. Whether the court would or not do so, must depend upon the circumstances of each particular case, but I see no reason why, if there does not appear to have been any bad faith, and a sufficient affidavit be tendered, the court should not arrest the proceeding at any stage of it; but this should never be done unless it be clear that the affidavit is full and frank upon all the points, within the deponent's knowledge, "necessary" for the party, and to which the witness' affidavit has been requested.

6th. I do not think that at this stage of the case, or in this way, an examination of the books can be had. The examination is not to be a substitute for a discovery of books and papers, nor indeed a discovery at all. If the witness does not *know* the fact sought to be proved, then his affidavit is not "necessary." He cannot be required either to take any means to inform himself, nor to produce anything which contains such information. This is not the remedy for such a case. This proceeding must not be confounded either with a trial, or a reference under section 271, sub. 3, of the Code.

These general views, which I have been obliged to express hastily and imperfectly, cover all the points of practice which I think are necessarily involved at present.

[The remainder of the opinion is occupied with somewhat extended remarks upon the frame of the order.]

KING *against* PLATT.

Court of Appeals; December, 1867.

JUDICIAL SALE.—ELECTION DAY.

A judicial sale—*e. g.*, a sale by a referee in foreclosure—is not void because it was made upon an election day. Such sale is not *business of a court* within the statute prohibiting such business on election days.

On the day of a sale in foreclosure of property consisting of lots in New York city, the defendant attended and presented a written request that the corner lot, which was the most valuable, should be sold first. The referee, however, directed the sale to proceed in a different order, and the property was bought in by the plaintiff. It appearing that the request was made in good faith, and in the belief that it would increase the amount realized, and no satisfactory reason for denying the request being shown,—*Held*, that the sale should be set aside and a re-sale ordered.

Appeal from an order of the general term of the Supreme Court, affirming an order denying a motion to set aside a sale in foreclosure, and for a re-sale.

The decision upon a motion to dismiss this appeal rendered at the March term (1867) of the court, is reported *Ante* 147; where the facts involved will be found stated in detail. It is sufficient here to say that the appellants, defendants in foreclosure, sought to have a sale which had been made by a reference in foreclosure set aside, on the grounds,—among others, that the sale was made on the day of a charter election; and that the plaintiff used means to prevent competition.

Wm. R. Martin and *James Emott*, for the appellants. I. The plaintiffs will not be injured by a re-sale. (Cudlipp *v.* Whipple, 13 *Wend.*, 228.)

II. The plaintiffs are proved to have been chargeable with misconduct in interfering to prevent competition, which has

worked an injury to defendant for which there is no remedy but by this appeal.

III. The following cases show that the courts will secure fairness and free competition at judicial sales, and will give relief against interference from whatever cause it arises, whether from concert or inadvertence. In none of the cases cited was the fraudulent misconduct shown, greater than in the present case. (Jones *v.* Caswell, 3 *Johns. Cas.*, 2d ed., 32; Thompson *v.* Davis, 13 *Johns.*, 115; Jackson *v.* Crafts, 18 *Id.*, 113; Collier *v.* Whipple, 13 *Wend.*, 226; American Ins. Co. *v* Oakley, 9 *Paige*, 261; Brown *v.* Frost, 10 *Id.*, 246; May *v.* May, 11 *Id.*, 203; Brisbane *v.* Adams, 3 *N. Y.* [3 *Comst.*], 130; Lefevre *v.* Laraway, 22 *Barb.*, 173; Requa *v.* Rea, 2 *Paige*, 339; Cantine *v.* Clark, 41 *Barb.*, 631; Gould *v.* Libby, 24 *How. Pr.*, 445; Troup *v.* Wood, 4 *Johns. Ch.*, 251; Hamilton *v.* Hamilton, 2 *Rich.* [*So. Car.*] *Eq.*, 355; Smith *v.* Greenlee, *Des.* [*N. Car.*], 128; Murdock *v.* Empie, 9 *Abb. Pr.*, 283; Turning *v.* Morrice, 2 *Brown Ch.*, 331; Fuller *v.* Abrahams, 3 *Brod. & B.*, 116; Exp. *v.* Hughes, 6 *Ves. Ch.*, 623; Sidney *v.* Ranger, 12 *Sim.*, 118; Baudon *v.* Becher, 9 *Bligh*, 532; Thornhill *v.* Glover, 3 *Don. & W.*, 195; Mortimer *v.* Bell, *Law Rep. Chy. App.*, 1,10; Green *v.* Baverstock, 10 *Jur., N. S.*, 47.)

IV. The sale was upon the day of the charter election. Under the provisions of our statutes (1 *Rev. Stat.*, 5th ed., 418; 1 *Laws of* 1857, 894,353. Matter of Election Law, 7 *Hill*, 194), the practice has become established and uniform that no courts are opened nor any business transacted on the days of charter elections. All the courts were closed on the day of this sale. The same rule should have governed the referee. Referees are judicial and not ministerial officers; sales are given to them rather than to sheriffs for that reason; under this judgment for the specific performance of a contract, the duties of the referee were judicial. This has been expressly decided of masters. (Snyder *v.* Stafford, 11 *Paige* 71; Knickerbocker *v.* Eggleston, 3 *How. Pr.*, 130.) And the position and powers of referees are drawn to the closest equality with those of the court, by the Code. A referee should follow the

practice of the court, and should not proceed to a judicial sale on a day when the court does not transact any business.

V. The plaintiffs and the referee were wrong in refusing to make the sale in the order required by the defendant. 1. There were no other parties in interest whose equities were to be consulted except the plaintiffs and defendants. There was no other question to determine the order of sale than this. What will be most beneficial for the parties? How can the most money be produced? The owner of the decree has not the right to control and direct which parcel should be sold first. (Snyder *v.* Stafford, 11 *Paige*, 76; Collier *v.* Whipple, 13 *Wend.*, 229.) 3. The referee acts judicially, and he must be free from the control or dictation of the plaintiff. When there are no stronger equities and order of sale required by the defendant is beneficial and will produce the most money, he may direct the order ofsale. (Walworth *v.* Farmers' Loan Co., 4 *Sand. Ch.*, 51; Knott *v.* Cottee, 27 *Beav.*, 33.) 4. The general doctrine contended for, that the sale must be made in the usual manner and so as to produce the most money is sustained on authority. (Gregory *v.* Campbell, 16 *How. Pr.*, 417; American Ins. Co. *v.* Oakley, 9 *Paige*, 261; Breese *v.* Busby, 13 *How. Pr.*, 485; Woods *v.* Monell, 1 *Johns. Ch.*, 505; Mohawk Bank *v.* Atwater, 2 *Paige*, 61; Veeder *v.* Fonda, 3 *Paige*, 94; Delaplaine *v.* Lawrence, 3 *N. Y.*, 301.) The reason why a sale is to be made in parcels is to benefit the parties and produce the most money. When a special order advances the same end, the same rule applies. 5. In such a plot as this the corner lot is the key to the whole. A person intending to purchase a parcel of lots including a corner, would first want to try whether he could get the corner; if a successful bidder for that, would then compete with the others for the adjacent lots. The price of the best lot would regulate the price of the others. Such a purchaser would hesitate in taking the side lots before the corner had been sold, and secured by him. By the course pursued, the plaintiffs became the purchasers of the side lots at low prices, and were accumulating the residue of their claim as a reserve, out of which to bid high on the lots last sold; in fact they could have bid $10,269 67 higher on the lots last sold. This advantage to the plaintiff was apparent,

at the outset to every purchaser present, and it became clear that no one but the plaintiffs could get the corner lot. This effectually counteracted the benefit that might have resulted to the defendant from a sale in parcels, and made the sacrifice of defendant's property needlessly severe.

John H. Reynolds, for the respondents. I. The fact that the sale took place on the day of a charter election in the City of New York, is no valid objection. There is no law against such a sale, and it was not unjust to the defendant.

II. None of the proofs made any case for interferring with the sale. It was fairly conducted, and there is no proof that the plaintiffs in any way interferred to prevent the competition of bidders. 1. There is no proof that the price was inadequate; but it appears that the property was sold for its full value. There is not a witness in the case that says the property was sold for an under price, on the contrary, every witness who was a bidder, states that the price bid "exceeded their views." 2. It is entirely settled that mere inadequacy of price is not sufficient to set aside a sale if it has been fairly conducted, and the parties concerned are capable of understanding their rights. (Thompson *v.* Mount, 1 *Barb. Ch.*, 609; Brown *v.* Frost, 10 *Paige*, 248; Duncan *v.* Dodd, 2 *Id.*, 101; American Ins. Co. *v.* Oakley, 9 *Id.*, 261; Tripp *v.* Cook, 26 *Wend.*, 157; Mott *v.* Wakely, 3 *Edw. Ch.*, 592; Woodhull *v.* Osborne, 2 *Id.*, 617.) 3. The mere speculations in respect to what price the lots would have brought if sold in a different order, are not of any account, and should be altogether disregarded. They do not appear to be founded upon any principle of common sense. The order of sale was prescribed by the referee (who was of large experience), against whom nothing is alleged; and the opposing affidavits show that no greater price could have been obtained if any other order of sale had been adopted. 4. The allegation that the plaintiffs, or any person in their behalf, approached any bidder, or interferred with the bidding at the sale is wholly unfounded. There is no proof of any such interference that should be for a moment considered by any court. 5. Mr. King has the unquestionable right to bid upon the property, so far that himself and associates

should be fully protected. It does not appear that any person was deterred from attending the sale by anything said or done by any of the plaintiffs or their agents. 6. There is not the slightest evidence any where in the case that any lot sold for less than its value. The whole property sold for more than the contract price, and for much more than the defendant claimed it to be worth in his answer, and no bidder or a person attending the sale, whose evidence has been taken, says that any lot sold for less than its value at the time. 7. No person has offered to give any greater sum for the property than it brought at the sale.

FULLERTON, J.—The sale of the defendants property was not void because it took place on the day of the charter election in the city of New York. The statute provides that no court shall be opened, or transact any business in any city or town on the day of election, for other than town or militia officers. (1 *Rev. Stat.*, 5th ed., 148, §§ 4 and 5.)

A judicial sale, although conducted by one of the officers of court, and under its direction, is not the business of a court, within the meaning of this statute. The object of the law referred to, was, undoubtedly, to remove all obstacles which might necessarily interfere with the free exercise of the elective franchise. If the ordinary business of the courts were permitted on election days, the attendance of witness and jurors could be compelled by compulsory process, and in that way they could be forcibly kept from the polls. It was to avoid such an evil that the statute was passed. A judicial sale of valuable property on an election day, presenting a tempting opportunity for gain, might induce sordid men to forego the privileges of electors, in order to promote their private interests; but their action would be voluntary; and freedom of action was all the law intended to secure.

The propriety of a forced judicial sale, of a large and valuable property, on an election day, when public attention would necessarily, to a great extent, be turned to other objects, after a written notice from the person who was to be most affected by it, that he would consider it "unjust and oppressive," was

at least very questionable; and, although not of itself perhaps sufficient to warrant the court in setting aside the sale, yet, in connection with the other facts disclosed in this case, cannot fail to create in the mind an influence unfavorable to the plaintiff.

The property which was the subject of this sale consisted of eight lots, situate on the corner of Fifth Avenue and Fifty-ninth Street, in New York City, at one of the entrances to the Central Park.

The order in which these lots should be sold was considered by the defendant a matter of interest to him, and consequently, on the day of sale, he made a written request that the *corner* lot, which was conceded to be the most valuable, should be sold first. This request was made with a view to cause the property to bring the largest price, and was therefore a proper and reasonable one. It was not, however, acceded to, and the lots were sold in a different order. I have examined the papers in this case with care, to see what reason was assigned, or could have existed, for this course, and I have been unable to find any that is satisfactory. The referee who sold the property states, in his affidavit, that "in the exercise of his discretion" he caused the premises to be sold in parcels, and in the order adopted at the sale.

That the referee acted in good faith, so far as his action is concerned, his well known character for integrity leaves no room to doubt; but no reason for believing that the sale of the corner lot first would have been detrimental to the sale having been furnished by the affidavits, or suggested on the argument, I cannot but think that the referee's discretion was exercised unwisely. That the defendant's request was made in good faith, and founded on the belief that, if granted, it would have increased the amount which the whole property would have brought cannot be doubted, and in that opinion he is sustained by six other persons who are experienced in the sale of property of a like character in the city of New York.

The case therefore resolves itself into just this:—that while the sale of the corner lot first *could do no harm*, there was good reason to believe that it would result in a benefit. Under such circumstances, it is difficult to arrive at any other conclusion

than that the defendant was unfairly dealt with. Whatever chance there was, however slight, that the order of sale he requested should be adopted, would prove beneficial, he was entitled to it, and to deprive him of it was a constructive fraud.

I have not overlooked the affidavits, on the part of the plaintiffs, expressing the opinion that the property would have brought no more than it did, if the corner lot had been sold first: yet I can see no good reason for not trying, at the least, a harmless experiment, to gratify a reasonable request of a failing and unfortunate debtor, which he thought would result to his advantage. I do not agree with the learned counsel for the motion, that the defendant had the right to determine the order of sale, and the authorities quoted do not sustain that position, but, in the absence of all directions by the court, the defendant has a right to be heard on the subject, his suggestions considered, and if, for the best, followed.

But in the light of the other facts in this case, it is difficult to believe that the refusal to accede to this request was the result of indifference or mere caprice.

The plaintiffs bought the whole of the property at the sale. Their right to do so, of course, is not disputed. If it were fairly done, without any undue advantage, a court of equity would not interfere with the sale. But, besides matters already considered, there are facts disclosed in the papers which give rise to serious doubts as to the entire fairness of the plaintiffs' conduct.

From the whole evidences it satisfactorily appears that the plaintiffs manifested a desire before the sale to purchase the whole of the property, and resorted to the means necessary to accomplish their object.

Raynor, who sustained intimate friendly and business relations with the plaintiffs, and who acknowledged that he would have the selling of the property, as broker, in case the plaintiffs should purchase it, said to a bidder at the sale, that he could purchase the property in one parcel *after* the sale upon better terms than he could get it *then* by bidding. Raynor also testifies that he made this commnnication at the request of one of the plaintiffs.

That this had a tendency to prevent competition at the sale can hardly be denied, and whether this effect was designed or not, it is equally fatal to the validity of the sale.

There is other evidence tending to show that the sale was chilled by the course pursued by the plaintiffs; but it is unnecessary to pursue the subject further.

The sale having been made against the defendant's remonstrance, on a day most unfavorable to a large gathering; and the lots having been sold in an order which induces a reasonable belief that it was detrimental to the defendant's interests, and under circumstances which give rise to apprehension that free competition was interfered with, it ought not to stand.

Whilst the law secures to the creditor his just demand, and sequestrates the property of the debtor to satisfy it, it still sedulously guards his interests, in all the various steps taken leading to a sale of his property. The unfortunate debtor is not beneath its protection. It will not tolerate the slightest undue advantage over him, even by pursuing the strict forms of the law or positive rules. (*Story Eq. Jur.*, § 239.) Occupying the position of advantage, it behooved the plaintiffs to pursue their remedy with scrupulous care, lest they should inflict an injury on one who was comparatively powerless.

A court of equity justly scruitinizes the conduct of a party, placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which *may* defy detection, and stands ready to afford relief on very slight evidence of unfair dealings, whether it is made necessary by moral turpitude, or only by a mistaken estimate of others rights.

I feel quite convinced that sufficient reasons exist for setting aside this sale, and that justice will be subserved by doing so, for it cannot result in any loss to the plaintiffs. The rights of third parties do not intervene, and the plaintiffs have a lien for the taxes and assessments they have paid. (Kortright *v.* Cady, 23 *Barb.*, 490). A resale will probably result in satisfying the judgment and all the outlays of the plaintiffs, and that is all they can reasonably ask.

If the parties fail to agree upon the order in which the property shall be sold, either party can apply to the court for

instructions to the referee. (Collier *v.* Whipple, 13 *Wend.*, 229.)

The orders of the general and special terms should be reversed, the sale set aside and a resale ordered.

All the judges were for the reversal of the order and for ordering a resale, except HUNT and PARKER, JJ., who were for affirmance.

Order reversed.

SEGUINE *against* SEGUINE.

Supreme Court, Second District; Special Term, December, 1867.

EXTRA ALLOWANCE.—APPEALS FROM SURROGATE'S COURTS

An extra allowance of costs may now be granted on an appeal from a surrogate's court, under section 309 of the Code of Procedure. Such an appeal is, for all purposes of costs, an action at issue on a question of law; and its determination constitutes a trial within the meaning of the section.

Motion for an extra allowance of costs.

The facts fully appear in the opinion of the court.

H. G. Davis, for plaintiff.

Geo. G. Reynolds, for defendant.

GILBERT, J.—This is a motion for a further allowance of costs under section 309 of the Code. The cause was brought into this court on an appeal from the decree of the surrogate of Richmond County, admitting the will in controversy to probate. This court affirmed the decree, and that judgment

was affirmed by the Court of Appeals with a modification, that "all the costs of this action to either party therein, be paid out of the funds of the estate to be adjusted," It is not asserted, that it is not a case in which a liberal allowance should be granted if authorized by the Code. But the respondents insist, that the court has no power to grant any extra allowance. It was so held by the general term in the Third District in the case of Bennett *v.* Sillimah (24 *How. Pr.*, 337). As sections 318 and 471 of the Code then stood, appeals from surrogate's courts were excluded from the provisions of the Code relative to costs. But in 1862, section 318 was amended by introducing the words "including appeals from surrogate's courts" and into section 471, after the words "surrogate's courts," the words "except that the costs on such appeal shall be regulated and allowed in the same manner provided by section 318." These amendments have rendered the decison in Bennett *vs.* Silliman inapplicable. The effect of them was to make appeals from surrogate's courts, for all purposes of costs, actions at issue on a question of law (§ 318) and to render the provisions of the Code on the subjects of costs applicable to such appeals. (§ 471.)

When this case was brought into this court, therefore, it became for all purposes of this question, an action at issue on a question of law. The determination of that appeal, was a trial. (Code, § 252.) By section 309 of the Code, the court is authorized to make a further allowance, in its discretion, to any party in a difficult and extraordinary case where a trial has been had, not exceeding five per cent. upon the amount of the subject matter involved. This was undoubtedly such a case. The amount involved was upwards of $80,000. A trial was had in it.

It follows, therefore, that the application is within the provisions of the Code, and the parties have a legal right to call for an exercise of the discretion thus vested in the court.

The motion is granted.

SWEZEY *against* BARTLETT.

Supreme Court, Second District; Special Term, January, 1868.

NON-RESIDENCE.—ATTACHMENT.—IRREGULARITY.

It is good ground for vacating an attachment, issued against an alleged non-resident and absconding defendant, that his absence from his place of abode was open and notorious; that he made no efforts to conceal the same; that his conduct was not designed to place any one on a false scent or to evade service of process, and that he omitted nothing which he was legally bound to do, to enable the plaintiff to find him. The mere failure of a plaintiff to learn the whereabouts of a defendant, affords no evidence of culpable conduct on his part.

The rule that a motion to discharge an attachment, if founded upon an irregularity, must be made at the earliest opportunity, or the delay excused, does not apply to motions for relief affecting the substantial rights of the parties.

Motion to vacate an attachment.

This action, with four others, was commenced by Oscar F. Swezey against William O. Bartlett, and attachments were issued, which the defendant now moved to vacate upon grounds stated in the opinion.

Grenville T. Jenks, for the motion.

J. Lawrence Smith, opposed.

GILBERT, J.—The attachments in these cases, were granted upon the allegation, that, as the plaintiff believed, the defendant was a non-resident of this State, but a resident of the State of New Jersey; and upon a further allegation as follows: "that said Bartlett has departed from this State, to avoid the service of a summons on him, or that if said Bartlett is in this State, he is here clandestinely, and keeps himself concealed here with the like intent."

The affidavits presented on the application for the attachment, do not make out a case of non-residence; the only facts stated in them are, that the defendant owned a farm in New Jersey; that he had been heard to say, he intended to move some cattle to this farm from his farm on Long Island; that letters were received from him, dated at various places in that State, and other facts and circumstances, which bear more directly upon the other allegation.

In respect to the latter allegation, I think it is sufficient in point of form, although disjunctively made. (People *v.* Recorder, 6 *Hill*, 431; Van Alstyne *v.* Ewine, 1 *Kern.*, 331.) The defendant's objection on this ground, therefore, is not tenable.

Upon the merits, although I think the facts and circumstances stated, warranted the plaintiff in swearing to his belief, that the defendant had absconded, or kept himself concealed, with the intent stated, yet upon the case as presented on this motion, I have no alternative but to conclude, that the defendant had not in fact absconded, or kept himself concealed for any purpose, much less for the fraudulent purpose imputed. His absence was open and notorious, and was unattended by any of the ordinary *indicia* of absconding. When in New York he was at a public hotel, and there is no evidence that he denied himself to anybody, or took any step to conceal his place of abode. The failure of the plaintiff to ascertain where he was, is not attributable to any culpability on his part. Perhaps an attempt to serve the summons by an officer designated by law for that purpose, would have been successful. Whether it would or not, however, is not important. It is enough that the defendant did nothing to put any one on a false scent, or to evade service, and omitted to do nothing which he was legally bound to do, to enable the plaintiff to find him.

The plaintiff however, objects, that this motion comes too late, and in support of the objection, cites the case of Lawrence *v.* Jones (15 *Abb. Pr.*, 110), decided by the general term in the Frst District, in November, 1852. It will be seen, by looking at the opinion delivered in that case, that the order denying the motion to discharge the attachment, was

affirmed on the ground that the motion was founded upon an alleged irregularity, and that the familiar rule applicable to motions for irregularity, was applied. This decision is in conflict with another decision of the same general term, in the case of Garbett *v.* Hauff (15 *Abb. Pr.*, 189). But independently of this, the rule referred to has no application to a case like this. "It does not apply to motions for relief affecting the substantial rights of the parties." (Doty *v.* Russell, 5 *Wend.*, 131.)

Now, as we have seen, the attachments in these cases were not irregular; inasmuch, as prior to the amendment of the Code, passed in 1857, it has been held, that the only remedy of the defendant in such a case, was by appeal. (Wiles *v.* Vanduzer, 14 *How. Pr.*, 548.) That amendment provides, that in all cases the defendant may move to discharge the attachment. Undoubtedly if the motion is founded upon an irregularity, it must be made at the earliest opportunity, or the delay must be excused. But what is an irregularity? Surely the obtaining of process, whereby a man's property is summarily seized in a case not authorized by law, is something more than an irregularity. To call it such is a simple misnomer. Tidd correctly defines an irregularity, to which the rule in question refers, to be the want of adherence to some prescribed rule, or mode of proceedings, and it consists in omitting to do something, that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time, or improper manner." (1 Tidd, 512.)

It is by no means clear, that under the circumstances, as disclosed by the affidavits, the defendant has been guilty of laches. But it is not necessary to consider that subject.

The motion must be granted without costs.

MATTER OF THE SOUTHERN BOULEVARD.

Supreme Court, Second District; Special Term, December, 1867.

HIGHWAY COMMISSIONERS.—INTEREST NO DISQUALIFICATION.

A private citizen, appearing in court in the capacity of tax payer only, cannot be heard in opposition to the confirmation of the report of commissioners of estimate and assessment, appointed under the act of 1867, ch. 290, providing for the improvement of a highway in Westchester County. Whatever interest an individual has in the determination of such question arises from his liability, in common with others, to contribute a tax or assessment, and is not sufficient to confer upon him a standing in court.

A commissioner appointed by special statute to award damages for property taken in laying out a highway, is not rendered incompetent from the fact of his owning land which has been taken for the improvement. A commissioner is a *quasi* judicial officer only, and is not within the application of the maxim precluding a person from acting as judge in his own case.

Upon a motion to confirm a report of such commissioners, it is too late to object to a member of that body upon the ground of personal interest. Such objection is maintainable only on the hearing of the application for their appointment; and from an omission to make it at that time, a consent, or waiver of the objection will be inferred.

Motion to confirm a report of commissioners of estimate and assessment.

By an act of the legislature, passed April 9, 1867, the towns of Morrisania and West Farms, in Westchester County, were authorized to construct a highway in said towns, to be called the Southern Boulevard. Commissioners were appointed by the act to lay out the highway, and, to this end, were empowered to convert the lands, and tenements necessary for the purposes of the act. The damages awarded for the lands so taken were directed to be assessed upon the strips of land fronting to the depth of five hundred feet on each side of the road respectively, the payments of said awards to be apportioned by commissioners of estimate and assessment, appointed

by the commissioners of the act. It was further provided that the report of the commissioners of estimate should be presented to the court for confirmation. Upon a motion to confirm such report, the questions discussed in the opinion arose; Mr. John B. Haskin, as a tax payer, opposing the motion.

Samuel E. Lyon, for the motion.

T. Darlington, in opposition.

GILBERT, J.—I am of opinion, that Mr. Haskin has not a right to be heard in opposition to the confirmation of the report in this case. He appears in the capacity of a tax payer only. Having only the common interest in the question arising from his liability to contribute, in common with others, to a tax or assessment—he has no standing in court. "Whatever concern such persons have in the question, belongs to them only as citizens and members of the community. No private person, or number of persons, can assume to be the champions of the community, and challenge the public officers to meet them in the courts of justice. (Doolittle *v.* Supervisors of Broome County, 18 *N. Y.*, 155.)

This principle, so necessary to prevent excessive and vexatious litigations, is protected and enforced by the statute regulating the proceedings in question. (*Laws of* 1867, *ch.* 290.) Section 10 of the act provides, that after the report shall have been completed, it shall be deposited with the town clerk; that there shall be published a notice thereof, and also, that the commissioners will meet at a time and place, to be specified in such notice, not less than twenty days from the first publication of such notice, to review said report; and that at the time and place so specified, all persons interested may offer objections, in writing, to the report, and accompany the same with affidavits. It then provides, that after the commissioners shall have reviewed their report, they shall give twenty days notice of the application to confirm the same; and that all persons interested may appeal therefrom, by a notice to be served on the town clerk, which notice shall be accompanied by copies of the objections and affidavits before mentioned, &c., &c.

Section 11 provides, that such appeal shall be heard, that copies of the affidavits aforesaid, but no others, may be read against confirming said report, but that no cause against such confirmation shall be heard, except the appeal aforesaid shall have been made.

The statute itself furnishes the law of the case, and requires me not to listen to the objections urged, in the form in which they are presented.

An objection which, if tenable, goes to the very root of the proceedings, was urged with a great deal of force and deserves to be noticed.

It was said that one of the commissioners owned some lots, which have been taken for the improvement, and was, therefore, incompetent to act, upon the maxim, that no man can be a judge of his own cause. The court was not aware of this fact, when the appointment of commissioners was made. Nothing appears before me, showing that any special injury to the objection has resulted from his action. On the contrary, the reverse is shewn by affidavits in support of the application to confirm. Still, if the objection be good in law, I do not think this is a sufficient answer.

There are however, I think, several answers to it. One is, that the maxim does not govern the case. It applies to judicial officers, but not to officers whose duties partake of an administrative character, and are only *quasi* judicial. (People *v.* Wheeler, 21 *N. Y.*, 82.) In this case, DENIO, J., says: "An act of public administration, though requiring the exercise of judgment, is quite a different thing from the dispensing of justice between man and man." If this objection should prevail, assessors, highway commissioners, tax commissioners, and many other boards of public officers, would be incompetent to act, and it would be impracticable to exercise some of the most important functions of the government. The public interest is supreme. Whenever compatible with this, officers like the one in question should be disinterested. It rests exclusively with the legislature, however, to determine, whether in cases like this, interest shall disqualify. The Constitution provides, that compensation for private property, taken for public use, shall be ascertained by a jury, or by

commissioners, as shall be prescribed by law. (Livingston *v.* Mayor of New York, 8 *Wend.*, 85, 102.) In this case, the only qualification for the commissioners, prescribed by the statute, is that they shall be residents of the county.

It may be added that the commissioner objected to, did not act in the appraisement of his own land. (Rex *v.* Varlo, *Cowp.*, 250; Rex *v.* Bellinnger, *Com.*, 293.) At common law, and also by a provision of the Revised Statutes (2 *R. S.*, 555, § 27), a majority of the commissioners were authorized to exercise the powers and duties confided to them, upon a meeting of all. This ground of objection, would seem, therefore, to have been obviated, for an interest in the question is never a disqualification. (People *v.* Edmonds, 15 *Barb.*, 529; Washington Insurance Co. *v.* Price, 1 *Hopk. Ch.*, 1.)

Furthermore, the objection should have been made on the hearing of the application for the appointment of commi sioners. Consent, or at least a waiver of the objection may be fairly inferred from the omission to make it at the proper time. In such a case it would, as was said by Lord DENMAN, in Regina *v.* Cheltenham Commissioners (1 *Adol. & El., N.S.*, 467), be monstrous to hold, that the mere presence of the interested commissioner, vitiated the proceedings. (Baldwin *v.* Calkins, 10 *Wend.*, 169.)

McDERMOT *against* McDERMOT.

Supreme Court, First District; General Term, January, 1868.

PRESUMPTION OF DEATH—WHAT IS GOOD TITLE.

A purchaser at a judicial sale, will not be compelled to take the title where a person who, if living, would have an interest in the property, is not proved to be dead, merely because such person has been absent, unheard from, for seven years. The presumption of death, arising from such absence, is not a sufficient basis for the title.

Appeal from an order at special term; entered pursuant to the following opinion.

CARDOZO, J.—I think the only material question is whether Robert McDermot, jr., is to be presumed to be dead, and if so, whether the title based upon that presumption is such as a purchaser should be obliged to take. The proof shows that he left this country about fifteen years ago on a whaling vessel, from which he deserted; that he was in the habit of writing to his mother, but that she has received no letter from him, nor has he been heard of in any way since the 28th of January, 1855, about thirteen years ago; that by letter of that date from Taleahuana, he informed her that something had grown over one of his eyes, threatening its loss, and that he in company with a shipmate had left the ship on which he sailed from this country, and had taken "to the bush."

There can be no doubt, therefore, that the absence thus shown, would, under the statute, raise a presumption of his death, in favor of a person having the remainder in property of which he held a life estate. This was not disputed on the argument.

In analogy to this and kindred statutes, the courts have held that the absence beyond the seas for seven years continuously, without being heard from, raises a presumption of

death. In other words, the courts have reduced the term of one hundred years which originally had to elapse before the presumption of death was raised, to the shorter period of seven years. But after all, in either case, whether of a long or short term, it is but a presumption; less likely of course, to be false in proportion to the length of the period, but still liable to be overcome by proof that the fact is different from the presumption. And the presumption might be disproved, even if the longest period was required for its basis; because though rare instances of persons living beyond one hundred years have occurred.

The absence then for seven years having been established, the legal presumption of death attaches, and unless that presumption is either destroyed, or reasonable doubt cast upon it, I think the purchaser must be required to take the title.

A purchaser is compelled, even on a judicial sale, to take a title which rests only on adverse possession (Grady *v.* Ward, 20 *Barb.*, 543), and such a title stands only upon presumption.

This question I think must be disposed of upon the same principles which were applied in Disbrow *v.* Folger (5 *Abb. Pr.*, 53) to the objection that three years had not elapsed since letters of administration had been granted on the estate of the ancestor who owned the lands for the partition and sale of which the complaint in that action was filed. It was urged that an order might be obtained from the surrogate to sell the lands for the payment of debts, and that a will might yet be discovered—either of which would defeat the title which it was sought to oblige the purchaser to take, but the court relying upon evidence from which it presumed against the probability of either of those events, compelled the purchaser to take the title, giving him however the right to have a reference, at his risk and expense, in case of a decision against him—a privilege with the like risk which I will extend on the present occasion.

The COURT* reversed the order; delivering no written opinion, but holding that the title was not such as a court of equity would compel a purchaser to take.

* Present—SUTHERLAND and INGRAHAM, JJ.

FISK *against* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

Supreme Court, First District; Special Term, February, 1868.

REMOVAL OF CAUSES.—CITIZENSHIP.—ACTIONS AGAINST CORPORATIONS.

One who maintains his domicil in another State, where his family reside, should be regarded as a citizen of that State, for the purpose of determining a question of removing a cause from a State to a Federal court, notwithstanding he carries on business in the State in the courts of which the action is brought, and visits that State regularly and frequently in the transaction of such business.

This principle applied to special facts in several instances.

What inference, as to the fact of citizenship, should be drawn from such acts as voting; procuring one's name to be registered as a voter; paying an income tax, &c.—considered.

The New York acts (*Laws of* 1853, ch. 466, and *Laws of* 1855, ch. 279), requiring corporations chartered by other States, and carrying on business in New York, to appoint an agent in New York to receive service of process against such corporations, do not affect the question of citizenship of the corporation, arising on a motion to remove an action in which it is a party, from a State to a Federal court; nor qualify the rights of parties to such an action in respect to such removal. Those acts provide a mode in which suits may be *commenced* in the State courts, against the corporations to which they relate; but do not prevent a corporation against which an action has been commenced from applying to have it *removed* to a Federal court.

For the purposes of an application to remove a cause from a State to a Federal court, a corporation must be regarded as dwelling in the State by which it is created, notwithstanding any business it may carry on in another State; and an action by or against it must be regarded as prosecuted by or against citizens of such State.

The provisions of the act of Congress of Sept. 24, 1789, relative to the removal of causes from State to Federal courts, do not authorize a removal of an action brought against more than one defendant, if any defendant is a citizen of the State in which the action is brought.

In applying acts of Congress authorizing removal of a cause in which the "plaintiff" or "defendant" is a citizen, to a case in which several persons are plaintiffs or defendants, it is requisite that all the plaintiffs or defendants should be citizens.

Fisk *v.* The Chicago, Rock Island and Pacific Railroad Company.

The construction of the acts of Congress of July 27, 1866 (14 *U. S. Stat. at L.*, 306), and March 2, 1867 (*Id.* 558)—relative to the removal of causes from State to Federal courts, and their application to the facts of a particular case,—determined.

Motions to remove causes to the United States Circuit Court.

Two actions were brought, one by James Fisk, jr., William Belden and William B. Bradford; and one by Rufus Hatch; against the Chicago, Rock Island and Pacific Railroad Company, and against John F. Tracy, and several other individuals, composing the directors of said company. The general object of the actions was to set aside an issue of new stock of the company which had been made or attempted by the directors, and to procure an injunction against any future transfers or sales of such new stock.

The defendants now applied for the removal of the causes to the United States Circuit Court, on grounds which appear in the opinion.

CARDOZO, J.—The applications to remove these cases to the United States Circuit Court, notwithstanding the learned and elaborate discussions by the distinguished counsel, do not, I think, present any very abstruse inquiries or serious difficulties.

It will be best first to settle the question of citizenship. No point arises in this respect, except as to Messrs. Fisk and Belden, two of the plaintiffs in one of the suits, and as to the Chicago, Rock Island and Pacific Railroad Company, and Mr. Tracy, who are defendants in both actions. All the other parties, whether plaintiff or defendant, are conceded to be citizens of this State.

I am of opinion that neither Mr. Fisk, Mr. Belden, nor Mr. Tracy is a citizen of this State, and also that the Railroad Company, for the present purpose, is to be regarded in the light of a citizen of another State.

As to Messrs. Fisk and Belden: Their affidavits of citizenship, as distinguished from mere temporary residence, are explicit and satisfactory. Mr. Fisk shows that he has had a

domicil in Boston for several years; that last year he purchased a house there, taking the title in his wife's name, and that there his family live, he coming to this city for the purposes of his business and returning to his home, in Boston, at intervals, as his occupation will permit. He would be regarded as a non-resident of this State, within the meaning of the statute authorizing attachments against the property of non-resident debtors. This view in conjunction with his oath upon the subject, leaves no doubt that he is, as he asserts, a citizen of Massachusetts.

Substantially similar facts are presented by Mr. Belden, and the question as to him is made more clear by proof that he has not voted in this State, but has done so regularly in New Jersey, since he took up his domicil there, several years ago.

I have not overlooked the fact that both of those gentlemen in the affidavits of justification to the undertaking on the issuing of the injunction, declare themselves to be residents of this State; but even if that be regarded as wholly inconsistent with their affidavits as to their being citizens of other States, I think the latter affidavits should not only be believed, but should control the question; because those affidavits in addition to a statement of a conclusion, to wit, that they are citizens of a specified State, disclose the facts upon which that conclusion is based, and no evidence has been given disputing or denying any of the facts detailed by them.

Respecting Mr. Tracy, the testimony is of a somewhat different character, but still I think there is enough to show that he has not changed his residence from Chicago to this City, nor become a citizen of this State instead of Illinois. There is no dispute that for many years prior to his becoming president of the railroad company, he was a citizen of Illinois. He swears that he is so yet. The plaintiff's theory is that he ceased to be so about the time that he accepted the presidency of the company. We must look at the proofs to determine the question. Not being a man of family, the circumstances may not be so marked in his, as in the case of Messrs. Fisk & Belden, but I think they are not the less certain. Presumptively, his citizenship of Illinois continues; and if the question of a change of it be left in doubt, the doubt must be resolved

against the plaintiffs, upon whom is the burthen of overcoming that presumption. But I see no circumstance inconsistent with Mr. Tracy's oath that he is still a citizen of Illinois. He was frequently, during the past year, back and forth between Chicago and New York, and invariably and when he could have had no motive for deception, placed his residence, on the books of the Fifth Avenue hotel, on arriving in this city, as being at Chicago. When he conveyed real estate, he described himself as of Chicago, and he frequently spoke of being a citizen of Illinois, and of his intention not to change his residence; and no person has been produced to prove that he ever asserted anything to the contrary. In Illinois he took the incipient steps to exercise the right of suffrage, having his name registered so as to entitle him to vote if he chose, or if his presence at Chicago, at the proper season, permitted him to do so. In that State only, he paid whatever personal or income tax he has paid. That he did not vote at all, at recent elections, does not assist the plaintiff's theory. Had he voted here, or had he caused his name to be registered here, that would have been evidence that he designed to make this State his home; but his omission to place himself in a position to exercise here, the right of suffrage, of which it is only reasonable to believe every citizen will feel it his duty and his privilege to avail himself, is rather corroborative of his claim that he did not intend to abandon his residence in Chicago, and that he lost his vote at the last election there, by temporary absence only.

Nor does the proof that Mr. Tracy has paid no personal nor any income tax in Chicago, since the year 1866, make against his claim. It would be significant if the plaintiff, had shown that any such tax had been paid by Mr. Tracy *here*, but the omission to pay at all, here or elsewhere, may be attributable, so far as the United States internal revenue is concerned, to the fact that Mr. Tracy claims "not to have made any profit," and so far as the State of Illinois, or the city of Chicago is concerned, may depend upon local laws under the provisions of which, perhaps, he may not have been liable to taxation. However this may be is not material. That Mr. Tracy has, during a period, escaped all taxation (except on real estate)

may or may not be consistent with his duty as a citizen, but I think it sheds no light upon the question of where he ought, if his property demanded it, to had been assessed.

I must conclude that he is still a citizen of Illinois.

As to the Railroad Company, it is claimed that although not chartered by or under the laws of this State, yet by the course it has pursued—having an office and transacting its principal business here, and by force of the statute of 1855 (*Laws of* 1855, *chap.* 279), it is to be deemed not aforeign corporation, in the sense of the acts of Congress, under which according to the decisions of the Supreme Court of the United States, a corporation is to be regarded as a "citizen" of the State from which it derives its charter, with the view to determining in what courts it may claim to sue and be sued.

Two decisions in this State, one in the Superior Court, by Justice Robertson (N. Y. Piano Co. *v.* N. H. Steamboat Co., 2 *Abb. Pr., N. S.* 357), and the other, a special term case, in this court, are cited in support of this proposition. The one in this court, is Stevens *v.* The Phœnix Insurance Company, (24 *How. Pr.*, 517), decided by Mr. Justice Allen, in 1863, in Oneida County. In the latter case some reliance seems to have been placed upon the "act to provide for the incorporation of Fire Insurance Companies" in this State (*Laws of* 1853, *ch.* 466), and it is now contended that the same effect is produced by the act of 1855, which is not restricted to insurance companies. The act of 1853, referring exclusively to Fire Insurance Companies, of course has no application here.

It is not certain that the act of 1855 applies either. It does not appear when the railroad company was chartered, and the act of 1855 would seem to operate only upon corporations theretofore created, as it provides that "every insurance and other corporation, created by the laws of any other State, doing business in this State, shall *within thirty days after the passage of this act*, designate some person residing in each county where such corporation transacts business on whom process" may be served. As the designation was to be made within 30 days after the act took effect, which was to be immediately on its passage, it may well be that the statute

does not relate to any corporation chartered after its passage, and the plaintiffs, who seek to bring this company under its action, have not shown that the incorporation of this railroad was prior to that time. But I do not mean to let my decision rest upon this ground. I assume for the present purpose that the railroad company is within the operation of the statute.

I am of opinion that the object and the effect of the provisions of the acts of 1853 and 1855, were to prevent our citizens being forced to go to another State to bring a suit against a foreign corporation which transacted business within our territory, and to afford them a method of commencing a suit here, against such foreign company; but without in any way cutting off, if indeed that could be done, the right of the foreign body, after being regularly sued in our courts, to remove the litigation, not to another State, but to the courts of the United States.

I do not see that keeping an agent here, either pursuant to a statute, or voluntarily without any legal obligation to do so, upon whom process can be served, works an agreement to concede that the foreign corporation, doing so, is a citizen of this State or can estop it from asserting the truth; any more than keeping property within our jurisdiction, by attachment of which the defendant might be compelled to appear, would work a waiver of his right to claim, at the time of entering his appearance, that he was not a citizen of this State. The foreign corporation by doing business and keeping an agent here virtually agrees to admit that it may be regularly brought into court here, but it does not agree that after being regularly sued, it will not, as any other citizen of another State might, exercise its constitutional right to transfer the litigation to the courts of the United States. Certainly there would seem to be no more reason or justice in preventing a foreign corporation which, by its officers chanced to be temporarily within our jurisdiction, so as to be sued in our courts, from removing the action to the courts of the United States than there would be in depriving the citizen of another State, who transacted business here, from taking to the latter courts a suit which had been brought against him by personal service of process upon him, while on a visit to our State, or in which he appeared to pro-

tect his property which had been attached because of his non-residence, and which he could have removed by making his claim to do so at the time he appeared. In each case our citizens are saved the annoyance and inconvenience of being obliged to travel to a foreign State to institute the suit, and in each case the defendant would and should have the right to avail himself of the statutes of the United States to remove the litigation to the Federal courts.

Whether the cases cited by the plaintiff's counsel are to be understood as resting exclusively upon the statutes of our State above mentioned, or depend upon the theory that, doing business here, a foreign corporation either with or without a compliance with those statutes, becomes to any extent a citizen of this State, I think they are fallacious; and yet, perhaps, I might have felt called upon not to deviate from them upon my own judgment alone. I confess I do not understand or appreciate how doing business here can affect the citizenship, so to speak, of a corporation, any more than the same circumstance would affect the citizenship or residence of an individual; and it is manifest that an individual may do business here and yet his citizenship of another State remain unchanged and unaffected by it.

In Dennistoun, &c., *v.* New York and New Haven R. R. Co., in the Common Pleas (1 *Hilt.*, 62), Judge DALY, whose decision was affirmed by the general term, in a learned and clear opinion held the company to be a citizen of Connecticut, although by a statute of this State, passed in 1846 (*Laws of* 1846, p. 231), the company was authorized to extend and continue its road through part of this State and for that purpose to purchase and hold real estate in our territory. It is to be remarked that although that company had its principal office, and transacted most of its business here, no one seems to have supposed that either of those facts or the act of 1855, before alluded to, deprived it of its character as a citizen of Connecticut; but it was claimed, that by force of the statute of 1846 it also became a citizen of this State. But Judge DALY held otherwise, saying that "the personalty of the defendants as a citizen, within the meaning of the judiciary act of the United States, was established and fixed by the State

of Connecticut, which first gave them their corporate being, and for the purpose of this motion, they must be regarded and treated as a citizen of that State." Surely if such a statute, of our own State, as that of 1846, regarding that railroad company, and its having an office and doing its principal business here, did not impress upon the New Haven Railroad Company the character of a domestic corporation, the mere transaction of business, and the keeping of an office and agents here cannot affect the citizenship of the Railroad Company in this case. But without pursuing these considerations further, I think it sufficient to say, that not only would it appear that the well considered opinion of Judge Daly had been overlooked, but the decisions of Justices Allen and Robertson are entirely irreconcilable with the case of the Ohio, &c., R. R. Co. *v.* Wheeler (1 *Black*, 286), which was not referred to by either of those judges, and was therefore probably not drawn to their attention, but which, being a decision of the Supreme Court of the United States, and upon a question peculiarly within its jurisdiction, I must, for that reason, if no other, consider paramount authority, and govern myself by it. Two propositions, both necessarily involved in the case, are with his usual clearness and precision distinctly asserted by Chief Justice Taney, who delivered the opinion of the court, and they are decisive of the present question. They are, 1st, that a corporation must dwell in the place of its creation, and can have no legal existence out of the bounds of the sovereignty by which it was created; and, 2nd, that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing a suit from the jurisdiction of a court of the United States.

"A suit by or against a corporation in its corporate name" must be regarded "as a suit by or against citizens of the State which created it."

I must therefore hold, that the railroad company, defendant here, whatever acts it may have done within our territory, dwells in the place of its creation, and not having been chartered by this State, is a foreign corporation,—a citizen of

another State (of what State, since it is not of this, and whether of one or two States, I do not stop to inquire, because wholly immaterial here)—and its citizenship cannot be questioned for the purpose of defeating the jurisdiction of the United States courts over an action brought against it.

It results from these views, that the position of these cases, as respects parties, is as follows: in one suit, the plaintiff is a citizen of this State; in the other, the plaintiffs are citizens, one of this State, and the others of other States, and in both cases, the defendants consist partly of citizens of this and partly of citizens of other States.

This statement of the situation of the parties, suffices to show that there can be no removal of the causes, under the judiciary act of 1789.

It does not now need citation of authority to sustain the proposition which, indeed, was scarcely disputed on the argument, that unless all the plaintiffs be citizens of the State in whose court the suit is brought, and all the defendants citizens of a State other than that, the action cannot be removed under that statute.

This brings us to the consideration of the act of 1866 (14 *U. S. Stat. at L.*, 306). A careful examination of that law leads to the conviction that it has no application to the case of Messrs. Fisk, &c., for the reason that that suit is not brought by a "citizen" of this State, and it is only in an action brought by a "citizen" (so far as the present question is concerned) of the State in the courts of which the case is pending, that a removal can ever be demanded.

The first element necessary as the basis of the application to remove is lacking here. The meaning of the term "citizen" in such statutes has been long established.

The plaintiffs collectively must, as we have seen, be citizens of this State, or they do not come within the requirement of the statute. If one be not a citizen of this State, although the others are, the action is not brought by a "citizen" of this State. This is so clearly put in the excellent opinion of Judge Daly, which I have before mentioned, that no other authority need be cited. There is nothing in the present act to indicate

that Congress intended to legislate, as far as the parties plaintiff are concerned, upon the theory that where there were several individuals of different States joined as the party plaintiff, any other rule should be applied than that which had long before existed when construing a statute which in referance to the parties plaintiff employs precisely the same language as is used in the act of 1866. I think, therefore, that that language should be understood exactly as it was theretofore defined. This view is strengthened by the fact that Congress resorted to language showing that it recognized the necessity of doing so, which leaves no doubt that a new rule governs as regards parties defendant. The just inference is, then, that the language of the judiciary act was adhered to in reference to the party plaintiff, because no change of the law was contemplated or desired, while other phraseology was introduced as to the parties defendant, because a new rule was to be made as to them.

But in Mr. Hatch's suit the difficulty, which I have mentioned, in the way of the removal of the cause, does not exist. Congress might very well have considered that if the action were not exclusively by a citizen of the State where it was brought, there would be no reason for allowing a removal at all, and yet have thought that in a case where the plaintiffs were all citizens of the State in which the action was brought, and there were associated with a defendant who was a citizen of that same State, persons who were citizens of another and different State, that any such foreigner ought separately, in certain instances, to be allowed the privilege of invoking the Federal judiciary. And, in my judgment, that is precisely the effect of the statute under examination. The whole context of the act shows that Congress designed to legislate for cases where there were several defendants, comprizing citizens of the State in which the action was instituted and citizens of other States. And by this statute it is, substantially, provided that, when an action in a State court is brought by a citizen of that State, against a citizen of the same State in conjunction with citizens of other States, any defendant who is a citizen of the other State may, in certain cases, transfer the litigation to the United States Courts, so far as it affects him. Now, in

the suit of Mr. Hatch, all the requirements thus described exist.

The action is by a citizen of this State against another citizen of this State and citizens of other States. What else, then, must appear, before the defendant, who is a citizen of another State, can claim to remove the litigation?

1st. The matter in dispute must exceed the sum of $500, exclusive of costs. With great deference to the distinguished counsel for Mr. Hatch, I think the cases relied upon by him to sustain his position that the present action does not fall within that description, have no analogy to this litigation. They did not concern property at all. This does bear upon property and upon property of enormous value.

2d. The statute then provides that if the suit be brought for the purpose of restraining or enjoining the person not a citizen, *or*, if there can be a final disposition of the controversy as respects him, without the presence of the other defendants, then the citizen of the foreign State may remove the cause "*as against him*" to the United States' courts. Of course it is agreed that this action is brought to restrain Mr. Tracy and the Railroad Company. Must it also appear that the suit can proceed to a final determination of the controversy, as respects them, without the other defendants?

I think not. The word "or" is disjunctive, and is so used in this statute as to show that Congress was providing for two different classes of cases; 1st where the suit was to obtain an injunction; and, 2d, where the presence of the other defendants was not necessary to the determination of the controversy as respects the defendant seeking the change of forum. I cannot say that Congress did not consider that restraining a person was of such serious importance as to justify a provision that in every such case, even if it should arrest the litigation, a citizen of another State might require that the action be transferred, if the condition of the parties plaintiff and defendant were as has been previously described. It would clearly be within the constitutional authority of Congress, when the plaintiff is a citizen of one State, to deprive the State courts of jurisdiction of any action to which a citizen of another State was a necessary party, whether

alone or with others; and therefore, it is equally within its power to provide for the removal of such a case after it has been instituted in the State court.

I have nothing to do with the consequences or the embarassments which may flow from the removal. The responsibility of the legislation does not rest with me; but I am responsible for the construction I give to that legislation; and I am bound to give it a fair and just one, and not to resort to ingenious and refined theories and unusual interpretations of words, which are of common use, and of sentences which are of ordinary import, for the purpose of evading or defeating what Congress may have, perhaps unwisely, attempted.

Mr. Tracy and the Railroad Company, are within the provisions of the statute of 1866, in the suit brought by Mr. Hatch, and so far as relates to them, and to that extent only, the action must be removed to the United States' courts pursuant to their petition; and when so removed it is by the statute "to proceed, in the United States Court, in the same manner as if it had been brought there by original process."

I only mention this for the purpose of saying that that portion of the section does not bear upon the question of removal and does not furnish any guide as to the *cases* which are to be removed. It only prescribes the practice which is to govern the proceedings in the action after its removal; viz: the same practice which prevails in actions originally brought in the courts of the United States. If it be said that the severance of the suit will prevent any efficient litigation and leave the plaintiff without remedy—as to which I express no opinion—I have only to answer that that misfortune proceeds from the exercise of the right of the United States to claim exclusive jurisdiction of actions between citizens of different States, and must be borne like any other consequence resulting from the constitutional exercise of sovereign will. The power to produce that effect exists, and if the exercise of it has so resulted, the courts cannot help it. It is of far less importance that the plaintiff should lose his remedy than that the courts should attempt wilfully to disregard and overthrow the constitutionally exercised power of legislation.

Respecting the act of 1867 (14 *U. S. Stat. at L.*, 558), very few remarks will be necessary.

I do not find anything inconsistent between this statute and that of 1866, and as there are no repealing words, I think the amendment is but an addition to the latter act. But, I am of opinion that this statute (1867) has no bearing upon either of the cases before me. The act says that "where a suit is pending or may hereafter be brought, in any State court in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State," &c. This, I think, is no more than saying "if a suit be brought by a citizen of the State in the court of which the action is commenced against a citizen of another State." Both sentences contain the same idea, and nothing else, differently expressed. That being understood, there is no difficulty in determining that the statute has no application to the present cases. It has been seen that when Congress, as in the act of 1866, as respects defendants, designed to provide for cases where the parties were composed of several persons, citizens of different States, phraseology was used clearly evincing the intent; and, therefore, when subsequently, Congress employs language which had long obtained a fixed and known interpretation, there is no reason to suppose that any other meaning was sought to be conveyed than that which the courts had theretofore given to those expressions. Hence, as the terms used in this act, both as respects the party plaintiff and the party defendant, were well understood to mean that the individuals constituting such party plaintiff should all be citizens of the State in which the action was brought, and also that the individuals composing such party defendant should all be citizens of some State other than that in which the suit was commenced, and that both of those conditions of parties plaintiff and defendant should co-exist to justify the removal of the action, the same construction must now be given to this statute and the same rule must obtain under it. And as the fact, as to the parties, does not bring either of these cases within that rule, I think no removal can be had under this statute.

I would only add, that it seems to me not unreasonable or

unlikely, that Congress, when it provided absolutely for the removal of a cause upon an affidavit, resting solely on the conscience of the affiant, should have said that it would not listen to the suggestion that prejudice or local influence would prevent justice in a State court, unless all the parties on the one side were citizens of that State and all the parties on the other side were citizens of other States, and, therefore, that it would permit this novel proceeding only when that condition of the parties litigant existed. If it be said that when the parties were thus situated a removal might have been had under the judiciary act, and that therefore this legislation was unnecessary, if this construction of the statute be correct; the answer is that is a misapprehension, because the statute as thus construed provides for two matters, which Congress probably thought worthy of attention, not covered by the judiciary act, viz: 1st. The removal of a case, at the instance of the plaintiff: 2d. The removal of a case *at any time before final hearing or trial*, instead of limiting it to the time of entering appearance in the action as prescribed in the act of 1789.

The magnitude of the litigation, and the grave consequences to the parties of an erroneous decision of these questions induced me to hear all the many eminent counsel concerned, and without any restriction as to time. And impressed with the solemnity and importance of the duty devolved upon me, I have brought all the power I possess to the calm, patient and candid investigation of the subject, with the sole object of reaching an accurate conclusion. Having done this, nothing remains for me, but to declare as the result of my reflections, that the prayer of the petitioners, in the case of Messrs. Fisk, and others must be denied; and that in the case of Mr. Hatch, so far as the petition seeks the removal of the action as regards Mr. Tracy and The Chicago, Rock Island and Pacific Railroad Company, it must be granted, but to that extent only, and in other respects it must be refused.

WOOD *against* THE MAYOR, &c., OF NEW YORK.

Supreme Court, First District; Chambers, February, 1868.

COUNTERCLAIM.—SETTLEMENT OF ISSUES.

In an action by a tenant to annul a lease upon the ground that fraud was practiced in procuring him to take it, the landlord may set up a counter-claim for rent which has accrued under the lease.

A reply which denies averments in the answer, which are material to the pleading a proper counter-claim, cannot be stricken out as frivolous.

Issues involving a charge of fraud, should be framed in so specific a form as to inform the party charged, precisely what he is required to meet.

Form of issues, settled for jury trial, in an action by a municipal corporation to annul a lease, *procured to* the corporation, on the ground of fraud practiced in procuring the corporate officers to enter into it.

Motions to strike out a reply; and to settle issues for jury trial.

This action was brought by the corporation of the City of New York, to annul a lease of buildings in Nassau Street, leased by the defendant to the city for public offices; upon the ground that the defendant procured the passage of resolutions of the aldermen and councilmen, authorizing the lease by fraud.

The defendant set up a counter-claim for rent accrued under the lease, to which the plaintiffs interposed a reply.

The defendant now moved to strike out this reply as frivolous.

The plaintiffs also applied to have issues framed for trial by a jury.

Mr. Shea, for the defendant,

Mr. Williams, for the plaintiff.

CARDOZO, J.—The defendant sets up, as he had the right to do,

a counter-claim for the arrearage of rent which he insists is due him from the city.

It is a mistake to suppose that the reply to that counter-claim is frivolous. The reply denies, thereby putting in issue, the allegations which are material and necessary to sustain the counter-claim. Such a reply may be false, but it cannot be frivolous; and as the motion of the defendant can only be supported and is based upon the theory that the reply is frivolous, it is obvious that the application cannot pervail. That matter being thus disposed of, there remains nothing to decide, because so far from opposing the motion for a jury trial, the counsel on behalf of the defendant, rather invited that course, if I should conclude that he was not now entitled to judgment upon the pleadings.

I have looked carefully into the pleadings, for the purpose of ascertaining what the issues should be. It would not be proper or just to frame any such broad and general questions as the counsel for the city have proposed. The defendant is entitled to know precisely what he is required to meet upon the trial. I am aware that the complaint contains a general allegation that "other corrupt and fraudulent arrangements" were made between the defendant and the then Mayor "and some of the members of the Common Council;" but such averments are never considered sufficient to create an issue. A person against whom a charge of fraud is made, is entitled to have the allegations specified definitely, otherwise the greatest injustice might be done him, however innocent, by being surprised on the trial by a statement of points of supposed fraud, then for the first time presented, and which from want of notice, he might be wholly unprepared to disprove, though they might be really utterly groundless. Fraud must not be lightly attributed to any one, and if the person asserting it has no facts to base it upon, he must not make such a charge, and if he has the facts, there is no hardship in requiring him to specify them. This is the only just and sensible rule.

I find but two issues specially made by the pleadings for the determination of which there can be the slightest necessity of the aid of a jury. These are:

First. Did the defendant, on or about the month of December, 1865, agree with the person then being the Mayor of the City of New York, in substance or to the effect, that in case the boards of aldermen and councilmen, by a vote of a majority of said boards, should pass and adopt, and the said Mayor should sign as approving the same, a resolution of the purport set forth in the complaint, viz :

Resolved, That the comptroller be and he is hereby authorized and directed to renew the leases now expiring of premises for the use of the law department, Nos. 115 and 117 Nassau Street, for a period of ten years, at the following rents, viz :—For the office of corporation counsel, $8,000 per annum; for the office of corporation attorney, $5,000; and for the office of public administrator, $5,000.

Then he, the said Wood, should or would pay or cause to be paid to the said Mayor, &c., to such of the aldermen and councilmen as should vote for said resolution, to be distributed among them, the sum of $21,000, or any other sum.

Second. Was the resolution aforesaid passsed by the said boards of aldermen and councilmen, and approved by the Mayor under and in pursuance of such agreement ?

These two issues I therefore settle and order to be tried by a jury. The circuit at which the trial shall take place can be determined when I settle the order.

LEAVITT *against* DABNEY.

New York Superior Court; Special Term, March, 1868.

CAUSE OF ACTION.—EXEMPTION OF AGENTS OF FOREIGN GOVERNMENTS.

A court of equity will not sustain a bill against parties residing within its jurisdiction, in respect of property and claims thereto which they hold merely as agents of a foreign government, over which, upon general principles of international law, the court could exercise no jurisdiction.

The claimants, in such a case, have no redress in the courts of justice of this country; but any wrong done them (if not a *casus belli*), must be the subject of diplomatic negotiation between the government of the United States and the foreign principal.

Motion to continue a temporary injunction.

This action arose upon the following facts: In July, 1866, the governments of Peru and Chili issued conjointly their bonds of $500 and $1,000 each, amounting in the aggregate to $2,200,000. The bonds stated that the governments of Peru and Chili had authorized the Minister Plenipotentiary of Peru, and the chargé d'affaires of Chili, accredited to the government of the United States, to raise funds and to issue bonds to represent the amount raised; and then declared that said governments of Peru and Chili were indebted to the bearer in the sum of $500 or $1,000 in American gold. Interest coupons were attached payable on the 1st days of January and July. The bonds were made payable upon the following, among other conditions, namely: "That the bonds will be countersigned by Messrs. Dabney, Morgan & Co., financial agents of the governments of Chili and Peru, at whose office the service of this debt will be performed. The financial agents shall keep a register of the bonds actually issued, subject at all times to the inspection of the bond-holders." After providing for the mode of payment, the bonds stated that "in addition to the public faith pledged by the republics of Peru and Chili, and the general hypothecation of all national incomes to the security and services of this debt, the government of Peru hypothecates specially and exclusively to the payment of its interest and redemption five hundred thousand tons of Peruvian guano from the deposits of the Chincha Island, and gives to each holder of these bonds and their legal representatives, the right to take possession of said guano, and export it in the quantity required, at the price of $25 in gold, per ton, on the failure of the above-mentioned governments to pay the interest or effect the redemption of the bonds, or any part thereof in the manner hereinbefore provided." The bonds were signed "F. S. Baneda," with the seal of Peru, and "F. S. Barnaga" with the seal of Chili, and countersigned Dabney, Morgan & Co., financial agents.

It was alleged by the plaintiffs that they were holders of 464 of such bonds for $1,000 each, and of 72 of such bonds for $500 each. That previous to their making the loan upon such bonds, and in view thereof, they were assured by the defendants that the bonds were valid and properly issued, and a good security. Six months interest, it was alleged, would become due on the 1st day of January, 1868, and the plaintiffs alleged that the defendants had in their hands the amount in gold sufficient to pay such interest, having received the same for that purpose from the republics of Chili and Peru, as financial agents thereof, and that the same was held by the defendants expressly for that purpose. It is further alleged that the defendants had informed the plaintiffs that they would not pay such interest falling due on the 1st day of January, 1868.

The relief demanded was, that the defendants be restrained from parting with such money received by them for the payment of such interest; that a receiver be appointed, and that the money in the hands of the defendant's be applied to the payment of such interest.

The suit was commenced on the 31st of December, 1867, and before the interest became due; and the right to an injunction was claimed on the ground of the defendants' announcement that they would not pay the interest falling due on the first day of the succeeding January. Upon these facts a preliminary injunction was granted, which the plaintiffs now moved to continue pending the action.

Upon the motion, the deposition of one of the defendants was read, which stated, among other things, that on the 23d of December, 1867, defendants received notice from the Peruvian Minister, not to pay the interest coupons falling due on the 1st of January, 1868, on the ground that the bonds held by the plaintiffs had been unlawfully issued, that they had been deposited in Mr. Williams' hands, who, contrary to instructions and agreement, had misappropriated or misapplied them, and had no authority to part with them. He further stated that the money in the hands of the defendants was the money of the Peruvian Government.

Henry A. Cram, for the motion,

Charles Tracy, opposed.

MONELL, J.—No claim is made against the defendants in this case, founded upon any representation alleged to have been made by them in respect to the validity or value of the bonds. If any such claim was made, the representations stated to have been made by the defendants would, I think, fall far short of being sufficient to sustain a cause of action. They were merely expressive of an opinion of and a belief in the validity and value of the bonds, and contain no evidence of any fraudulent purpose on the part of the defendants.

Nor is there any question properly involved, in respect to the *bona fide* ownership of the bonds by the plaintiffs. For the purposes of the action, and upon the proof before me, it appears that they made advances upon the security of the bonds, which were of the genuine issue of the Peruvian and Chilian governments, without any notice that they had been, as is now alleged, misappropriated or misapplied by some functionary or agent of those governments. Having received the bonds under such circumstances, it is not probable that the mere wrongful putting in circulation of bonds payable to bearer, and transferable by delivery, by the agent of the obligors having them in his custody, would invalidate the title of a purchaser for value and without notice. This is upon the principle applicable to the diversion of notes or the wrongful issue of stock (Merchants' Bank *v.* New York & New Haven Railroad Company, 13 *N. Y.*, 599, 611), and is carried much farther in respect to stolen bonds of a similar character.

Nor do I conceive that any inquiry into the sufficiency of the reasons assigned by the defendants for the non payment of the January interest is legitimately involved in the motion now before me. I am bound perhaps, to assume that such reasons were in fact sufficient, or were at least regarded as sufficient by the Peruvian and Chilian governments, to authorize their withholding payment. At any rate, the defendants, the agents of, and acting under instructions from those governments, would violate their trust and duty if they disregarded or

disobeyed their instructions; and they have no right, either in respect to the interests of creditors or otherwise, to inquire into or question the sufficiency or propriety of the reasons assigned by their principals for any direction they might see fit to make respecting the agency, nor indeed to require any reasons whatever.

The sole question then is—have the plaintiffs stated facts, which, in their legal effect, are sufficient to authorize the interference by a court of equity to compel the payment of money, in the hands of an agent of a foreign government, to creditors of such government? No action can be sustained by these plaintiffs against the Peruvian and Chilian governments. Our courts have no jurisdiction over foreign powers, and disputes or claims arising between or in favor of our government, or the citizens of our government, and a foreign power, can be settled only by treaty or by war. Nor am I aware of any law under which the moneys in the defendants' hands can be impounded or attached at the suit of a creditor, or can in any other way be reached or applied to the payment of debts existing here against the foreign principals; and it is therefore probable that the plaintiffs are without remedy, beyond such as is provided in the bond, or such as they may induce the government of the United States to resort to in their behalf. The only jurisdiction which, by any pretence, a court of equity could exercise in a case like this, is in exerting its restraining power to prevent, pending the litigation, a disposition of the fund provided for the payment of interest, which might deprive the plaintiffs of the benefit of such judgment as they might obtain. So far as any other relief is concerned, the remedies at law would, if the plaintiffs have any remedy, be quite adequate.

But while courts of equity recognize and protect rights and redress wrongs, their jurisdiction over these subjects is confined to such rights or wrongs only as are exclusively and exactly distinguished from that portion of remedial justice which is properly administered by courts of common law. And while courts of equity administer remedies for rights which are not recognized by courts of common law, the foundation which sustains the jurisdiction of either court is the same; and the

cause of action must be such that the court can take hold of it and apply appropriate remedies and give appropriate redress. There is no principle of equity which will sanction its assuming jurisdiction, merely because at law there is no remedy, unless the facts are such as make up a case exclusively for equitable relief. In other words, there must be a cause of action, whether resort is had to the one forum or the other.

In this case, it seems quite clear that the plaintiffs have not made out a claim for the equitable relief they seek to obtain. As before remarked, our courts have no power over the foreign principals under whose authority and control the defendants can alone rightfully act. And, being without jurisdiction over the parties, we cannot assert our authority over the property of such parties, notwithstanding such property is within our territorial limits. The fund in question is the property of the Peruvian and Chilian governments, and not the property of the defendants, and there is no proceeding *in rem* unless in actions over whose parties we have acquired or can acquire jurisdiction. I cannot, therefore, discover any ground upon which this action can stand. I have endeavored to find some analogy in principles applicable to equitable assignments, or equitable liens, but without success. The plaintiffs cannot reach the fund because they cannot reach its owners. It is a misfortune, it may be wrong, but our courts are without power, and the plaintiffs must be left to pursue such other course as may be open to them. If this act of repudiation was without justifiable reason, it should perhaps, (if not a *casus belli*) be the subject of diplomatic negotiation between these foreign powers and the government of the United States.

The injunction must be dissolved, with the usual motion costs.

PHILLIPS *against* WOOSTER.

Court of Appeals; March, 1867.

CREDITOR'S ACTION.—GIFT BY HUSBAND TO WIFE.

In a creditor's action brought against husband and wife to enforce a judgment against the husband out of real property held in the wife's name, it appeared that the real property was bought from the plaintiff himself, with money which the husband gave to the wife in good faith, at a time when he was free from debt; and also that the debt on which the judgment was recovered was incurred by the husband to the plaintiff, and the conveyance made by the plaintiff to the wife, simultaneously, and with a full knowledge of the facts attending the conveyance which he now sought to impeach.

Held, that the action could not be maintained. 1. A gift by a husband to a wife, made when he is free from debt, cannot be impeached on the ground of debts subsequently contracted.

2. The plaintiff was prevented from impeaching the conveyance by having himself consented to it.

Appeal from a judgment of the supreme court.

The facts involved in the present appeal are stated in the opinion.

PARKER, J.—This action was brought by the plaintiff, a judgment creditor of the defendant George H. Wooster, to enforce payment of his judgment out of certain leasehold property conveyed by the plaintiff to the defendant Emma C. Wooster, the wife of the other defendant; and is based upon the allegation that George C. Wooster paid for the property, and that the same is, therefore, liable for his debts.

The action was tried at the New York special term, before Mr. Justice ALLEN, who found as follows: "In March, 1858, the plaintiff entered into a written contract with the defendant Emma C. Wooster, to sell and convey to her the leasehold premises mentioned and described in the complaint, and on or about the first day of May, 1858, a proper deed of conveyance to vest the title of said premises in the said Emma C. Wooster

was executed by the plaintiff, and at the same time a bond and mortgage on the premises to secure that part of the purchase money for which a credit was to be given, were executed by the defendants. Prior to this, two payments had been made on account of the purchase money, and the deed and bond and mortgage were left with William Peet, Esq., to be delivered to the parties entitled to the same, respectively, when that part of the purchase money which was to have been paid by the first of May, should be actually paid. This was paid about the 26th of June, when the deed and mortgage were delivered by being handed to the proper officer for record, and the sale was fully consummated, and the title to the premises, subject to the mortgage, vested in the defendant Emma C. Wooster. The money paid before the actual delivery of the papers, and which constituted one-half of the purchase money, was paid from moneys, and avails of choses in action, and other property given to her by her husband, prior to March, 1858.

At the time of the execution of the deed and mortgage, the defendant George H. Wooster, concluded a bargain with the plaintiff for the purchase of certain personal property on the premises, for three hundred dollars, on a credit of five months, for which he gave his note to the plaintiff. Judgment was obtained on this note, and an execution issued thereon against the property of the defendant George H. Wooster, which was returned unsatisfied before the commencement of this action."

As conclusions of law, the said justice found "that the plaintiff was not a creditor of George H. Wooster, at the time of the conveyance, within the meaning of the statute (1 *Rev. Stat.*, 728, §§ 51, 52), the debt having been contracted simultaneously with the conveyance, and the credit given with the full knowledge of the transfer and conveyance," and, therefore, was not entitled to any relief. Judgment was thereupon given for the defendants. Upon appeal by the plaintiff to the general term, the judgment was affirmed, and the case is brought by appeal to this court.

There is no allegation in the complaint, and no finding or evidence of actual fraud on the part of the defendants. Neither is there any allegation or finding or evidence that, at the time when George H. Wooster gave his wife the money and property

out of which the purchase money actually paid arose, he was indebted to the plaintiff or any other person. Under such circumstances I am unable to see on what ground the plaintiff can make a valid claim to apply the property in question to the payment of his judgment. In the first place, the gifts and voluntary conveyances of George H. Wooster to his wife, made without fraudulent intent, at a time when he was indebted to no one, were in equity valid and effectual, and are not to be called in question in a court of equity by his subsequent creditors. (Sexton *v.* Wheaton, 8 *Wheat.*, 229; Neufvilie *v.* Thomson, 3 *Edw. Ch.*, 92; Borst *v.* Spelman, 4 *N. Y.* [4 *Coms.*], 284.) Subsequent indebtedness cannot be invoked to make that fraudulent, which was honest and free from impeachment at the time. (Babcock *v.* Eckler, 24 *N.Y.*, 630; Reade *v.* Livingston, 3 *John. Ch.*, 500; Seward *v.* Jackson, 8 *Cow.*, 406; Hinde *v.* Longworth, 11 *Wheat.*, 199.) The money paid for the property in question was not then, as between this plaintiff and Mrs. Wooster, the money of her husband, but her own money. The case, therefore, is not within the statute which declares that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another * * * such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration." (1 *Rev. Stat.*, §§ 51, 52, 1st ed.) The husband did not, in this case, pay the consideration, so that no resulting trust arises in favor of the husband's creditor.

But again, the position which the plaintiff occupies in relation to the transaction complained of as fraudulent, excludes him from alleging the fraud, or claiming any benefit against it. The conveyance against which he now seeks to derive advantages from the property, was made by himself, with a full knowledge of all the facts as they existed at the time, as we are bound to presume, since he has shown nothing to the contrary. (Grant *v.* Morse, 22 *N. Y.*, 323.) So that if the money paid was the debtor's, as he now insists it was, and the conveyance to the wife, therefore, fraudulent as against creditors, it was not fraudulent as against him, for he was not only consenting to the act, but himself performing it. Surely

the maxim *volenti non fit injuria* must be admitted to be applicable in such a case. It is no matter, therefore, whether he was a creditor *at the time* or not. Admitting that he was, he has excluded himself from the advantage which the statute provides for creditors in such cases.

I am of the opinion that the judgment is right, and should be affirmed.

All the judges concurred in the above opinion except GROVER and HUNT, JJ. They concurred in the result.

Judgment affirmed.

BRETZ *against* THE MAYOR, &c., OF NEW YORK.

New York Superior Court; Special Term, March, 1868.

PUBLIC STATUTE.—TAKING JUDICIAL NOTICE.

The distinction between *public* and *private* statutes,—stated.
An act enabling the local authorities of a particular city or county, to raise money by tax, for the payment of certain claims against it, is not a public, but a private act; and the courts cannot take notice of it, unless it is pleaded.

Demurrer to complaint.

This action was brought in the Superior Court of the city of New York, by Jacob Bretz against the city, to recover damages for injuries sustained in being thrown from a carriage in the Eighth avenue in consequence of that street being out of repair.

The defendants demurred to the complaint upon the ground that the superior court had no jurisdiction of the action

Upon the argument of the demurrer, the defendants relied upon section 6 of the act of April 23, 1867 (2 *Laws of* 1867, ch. 586, 1606), entitled "an act to enable the board of supervisors of the county of New York, to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof; and to provide for the auditing and payment of unsettled claims against the city and in relation to actions at law against said corporation."

The section cited provides that "hereafter, all actions against the mayor, aldermen, and commonality of said city of New York, shall be brought in the Supreme Court of the First Judicial District, which court shall have exclusive cognizance of such actions."

The question upon which the argument of the demurrer finally turned was, whether this was a public statute of which the court should take judicial notice, or whether it must be pleaded to entitle the defendants to the benefit of their objection.

D. J. Dean, for the demurrer.

A. H. Reavey, opposed.

MONELL, J.—The act referred to is not pleaded, but I am asked to take judicial cognizance of it as a public statute. The immediate question before me, therefore, is whether such statute is a public or a mere private or local law.

No objection is urged to the complaint, other than that the act referred to has deprived this court of jurisdiction of any action against the corporation of the city of New York. The question of the validity of the act as conflicting with section 16 of article III. of the constitution of the State, providing that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed on its title," is not properly before me at this time, and I have therefore confined my examination to the only question which is before me.

General or public acts are such as relate to or concern the interests of the public at large; and private acts are such as

relate to private individuals, or which concerns a particular *species* of some general *genus* or thing. Such are the definitions given in *Smith's Commentaries on Statutes*, section 795. In his enumeration of public acts, he specifies those concerning the king, queen or prince, or in the American States, the the government and its coördinate departments; those concerning the whole spirituality; acts concerning trade in general, or which relate to all subjects of the realm; acts which concern all persons, though of a special nature, such as acts concerning assizes or woods, or forests, chases, fisheries; and private acts when recognized by a public act. And in the enumeration of private acts, are such as relate to a particular place, or to divers particular towns, or to one or divers particular counties, &c. Other acts, which in their objects and operations, are merely local or limited, are nevertheless treated as public acts, either by virtue of a special clause declaring them to be so, or because, although limited to a particular section or locality, yet they affect the public at large, when acting within that section or locality, in reference to matters within the purview of the act. (Holland's Case, 4 *Co.*, 76 *a.*)

"The distinction," says Blackstone (1 *Black. Comm.*, 86), "between public and private statutes is this: A general or public act is a universal rule that regards the whole community, but a special or private act is rather the exception than the rule."

There are statutes which are local in one sense, which are nevertheless public statutes; for it is not necessary to constitute a statute a public act that it should be equally applicable to all parts of the State. It is sufficient, if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute. In Pierce *v.* Kimball (9 *Greenl.*, 54), an act which provided for the survey of timber in the county of Penobscot, and prohibited sales unless thus surveyed and marked, was held to be a public act, as it operated upon all persons. So an act for the preservation of fish in a particular river was pronounced a public act, inasmuch as it was obligatory upon all citizens. (Burnham *v.* Webster, 5 *Mass.*, 266.) A similar decision was made in Jenkins *v.*

Union Turnpike Company (1 *Cai. Cas.*, 86), where the act incorporating the company contained a clause vesting the road, on a certain event, in the people, and for that reason it was held to be a public act. And in Bank of Utica *v.* Smeeds (3 *Cow.*, 684), the chancellor intimated that the act authorizing the bank to establish a branch office was a public act, because the act incorporating the bank declared it to be a public law. The point, however, was not decided. Again, the act authorizing the railroads of the State to subscribe to the capital stock of another designated railroad, was pronounced to be a general law, as it applied to all railroad corporations (White *v.* Syracuse & Utica Railroad Co., 14 *Barb.*, 559). But an act of Congress relative to insolvent debtors within the District of Columbia was held to be only a private statute, of which the State courts were not bound to take notice (Wright *v.* Patin, 10 *Johns.*, 300). Indeed, all the local statutes which have, as far as my observation has gone, been declared to be public statutes, were either penal statutes affecting all citizens who might offend, or statutes of a remedial character where all persons might come within their purview (Pierce *v.* Kimball, *ubi sup.*; Hendin *v.* Ayres, 12 *Pick.*, 344).

In the case of the Sun Mutual Insurance Co. *v.* The Mayor, &c., of New York (8 *N. Y.* [4 *Seld.*], 241), the validity of an act similar to the one I am considering, passed in 1850, was considered; and although it was not declared in that case that the act of 1850 was a private law, yet such result necessarily followed from the decision, which was that the act did not conflict with the constitutional provision to which I have already referred. If the court had pronounced the act a public statute, the point decided could not have arisen. The case may therefore be regarded as an authority. In two cases also recently decided—one in this court (Smith *v.* The Mayor, &c.), the other in the supreme court of this district (Putnam *v.* The Mayor, &c.), the same view has been taken.

The title of the act under consideration, as well as the subjects embraced in it, are of a purely local nature. It

is an act to enable the local authorities to raise money by tax for the use of the corporation of the city. It empowers the board of supervisors of the county to cause to be levied and raised by tax, upon the taxable property of the county, for the use of the mayor, aldermen, and commonalty of the city of New York, an amount equal to the several sums thereinafter stated. Then follow the several sums needed for the support of the city government. The act is not penal. It relates exclusively to the raising of money by tax levied upon property belonging to the inhabitants of New York, or such as own property therein; which money is appropriated to the support of the city government. Its operations are confined to this county, and it has no effect, even of the remotest character, in any other part of the State, or upon the people of any other place. It is an enabling act necessary for the administration of local government, and relates to and affects the interests of this county exclusively, and in which no other part of the State can have any concern. Nor can it be questioned by any others than those who are thus immediately affected by it. By its title, therefore, as well as in all its provisions, in the effect to be given to them, and in the interests it involves, it is, within the definitions I have given, as local and private a law as any that could be enacted.

If I am correct that this act, commonly called "the tax levy," is a local statute, then it should have been pleaded, and I cannot take judicial notice of it. My decision goes no further, as I have not deemed it either necessary or proper to look into the act to see whether it is or not exposed to the constitutional objection urged upon the argument. That question can be determined when when the act is formally brought to the notice of the court.

There must be judgment for the plaintiff upon the demurrer, with costs, with leave to the defendants to withdraw the demurrer and answer the complaint on payment of costs.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume:

Viz.—35 and 36 NEW YORK; 47 and 48 BARBOUR; 3 ABBOTTS' PR. N. S.; 33 and 34 HOWARDS' PR.; 1, 2 and 3 ROBERTSON; and in LAWS OF 1867.

ABATEMENT AND REVIVAL.

1. Where an action is commenced by service of process upon only one of several defendants jointly indebted, and the defendant served dies before judgment, and before the others are brought in, an order to continue the action against the personal representative of the deceased defendant is not proper. The action should be continued against the other defendants. Fine *v.* Righter, *Ante*, 385.
2. When the mortgagor, being appointed one of the executors of the will, accepts the trust, and qualifies, his co-executor, having accepted and qualified, may proceed to revive the suit against the mortgagor-co-executor, upon the principle that one co-executor may obtain an action in equity against another co-executor, to compel the payment of a debt owing by him to the estate. *Ct. of Appeals*, 1866, McGregor *v.* McGregor, 35 *N. Y.*, 218.
3. A suit to foreclose a mortgage, commenced by a testator, in his lifetime, against the mortgagor, who is appointed one of the executors of his will, and which suit was pending at the death of the testator, does not abate by his death, but survives to his personal representatives. The Code (§ 121) provides that no action shall abate by the death of a party, if the cause of action survive or continue. The cause of action is the non-pay-

ment, at maturity, of a debt due from the mortgagor to the deceased, secured by a mortgage upon real estate. This cause of action survived against the debtor and mortgagor. As against the mortgagor individually, no question could be raised. But the mortgagee died during the pendency of the action, leaving a will by which he appointed the mortgagor one of his executors, which trust he accepted; but such appointment and acceptance cannot have the effect of abating such suit. Had the mortgagor refused to accept the trust, it cannot be pretended that any such result would follow; and the question whether the action against him abated cannot depend on his acceptance or non-acceptance of the office of joint trustee of the estate of the original plaintiff. *Ib.*

ACKNOWLEDGMENT (OR PROOF) OF DEEDS.

1. Notaries public can take acknowledgments of deeds, &c., anywhere within the county for which they are appointed, and in which they reside; and when thus taken, they are entitled to be recorded in any other county in the State, when the signature and official character of the notary are attested by the usual clerk's certificate. Where these conditions are not complied with, and these requirements do not exist, the conveyance is not entitled to be recorded. *Supreme Ct.*, 1867, Utica & Black River R. R. Co. *v.* Stewart, 33 *How. Pr.*, 312.
2. Under the act of 1860 (Laws of 1860, 594),—regulating assignments,—an assignment for the benefit of creditors must be acknowledged by the debtor in person. It cannot be acknowledged by his attorney, or proved through the medium of a witness. Adams *v.* Houghton, *Ante*, 46.
3. To entitle any conveyance or written instrument, acknowledged or proved under the preceding section (relating to acknowledgment or proof made out of the State of New York, and within any other State or Territory of the United States), to be read in evidence or recorded in this State, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate, under the name and official seal of the clerk, register, *recorder or a prothonotary* of the county in which such officer resides, *or the clerk of any court thereof, having a seal*, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, register, *recorder or prothonotary* is well acquainted with the handwriting of such officer, and verily believes that the signature to said certificate of proof or acknowledgment is genuine. *Laws of* 1848, 304, ch. 195, § 2, as amended 2 *Laws of* 1867, 1515, ch. 557, § 1.*
4. This act shall apply to all conveyances or written instruments heretofore proved or acknowledged and recorded, or to which a certificate has been subjoined or attached, as provided by this act, but shall not affect any litigation now pending. *Id.*, § 2.

* The amendment consists, substantially, in the addition of the words in *italics.*

AFFIDAVIT.

1. An affidavit, in the commencement of which the deponent is designated by name, is not void for not being subscribed by him. *N. Y. Superior Ct.*, 1863, Soule *v.* Chase, 1 *Robertson*, 222.
2. In granting an order to compel a party to make an affidavit to be used on a motion under section 401 of the Code, the judge must be satisfied by competent and sufficient proof:—
   1. That the party applying for it intends to make or oppose a motion.
   2. That it is necessary for him, in making or opposing such motion, to have the deposition of some person who refuses to make a voluntary affidavit. *N. Y. Superior Ct. Sp. T.*, 1867, Moses *v.* Banker, 34 *How. Pr.* 212.
3. Where it appears, from the affidavit upon such application, that the motion intended is merely to make an answer more definite and certain; or that the person whose testimony is required is incompetent; or that the real object of the applicant is, under the guise of a motion, to obtain an examination which he otherwise could not get, the court is bound to refuse the order. *Ib.*
4. A party to an action, as well as any other witness, may be compelled to make an affidavit, under subdivision 7 of section 401 of the Code of Procedure. Fisk *v.* Chicago, &c. R. R. Co., *Ante*, 430.
5. A "fishing" examination is not allowable under that section. An order for the examination can only be made upon proof that the affidavit of the witness is "necessary;" and to allege this involves knowledge in advance of the facts to which the witness will testify. *Ib.*
6. The proper course, when an affidavit is desired, is, ordinarily, to draft an affidavit, and submit it to the witness to be verified, before applying for an order. *Ib.*
7. But the objection that no affidavit has been prepared and submitted may be waived; and it is waived, if, when asked to make affidavit, the witness does not require a draft to be submitted, but makes a general refusal to testify. *Ib.*
8. After a witness has refused to make affidavit, and an examination has been ordered, the court should not arrest it upon the ground that an affidavit has subsequently been tendered, unless it very clearly appears that such affidavit is full and frank. *Ib.*
9. No examination of books and papers is allowable, in the proceeding authorized by subdivision 7 of section 401 of the Code. *Ib.*

ALIMONY.

1. Good cause for granting alimony in an action for a limited divorce must be shown. It is not a matter of course. Mere allegations of abandonment, generally, and of neglect or refusal to support, are not sufficient to

warrant a grant of alimony, where they are denied. *N. Y. Superior Ct. Sp. T.*, 1865, Boubon *v.* Boubon, 3 *Robertson*, 715.

2. To entitle the plaintiff to alimony and counsel fee, in an action for a divorce for cruel and inhuman treatment, she must make it appear that she has been injured, and present a meritorious cause of action. A single instance of cruelty is not sufficient to authorize the court to interfere, although vague charges of cruel treatment are also made against the husband. *N. Y. Superior Ct. Sp. T.*, 1863, Solomon *v.* Solomon, 3 *Robertson*, 669.

AMENDMENT.

1. The powers conferred by the Code of Procedure upon courts of record to amend the pleadings,—stated. Meyer *v.* Fiegel, 34 *How. Pr.*, 434; Denis *v.* Snell, *Id.*, 467.
2. The court cannot allow an amendment, the effect of which is to introduce a new cause of action. The power of amendment is limited to the subject-matter for which the action was originally brought. *N. Y. Superior Ct. Sp. T.*, 1864, Van Syckels *v.* Perry, 3 *Robertson*, 621.
3. The court has power, under section 173 of the Code of Procedure, to permit a defendant to amend his answer by setting up the defense of usury, although the original answer did not allege it. Union National Bank of Troy *v.* Bassett, *Ante*, 359.
4. *It seems*, that the decision of the court at special term, upon such a motion, although involving the exercise of discretion, is reviewable upon appeal to the general term. *Ib.*
5. The court has full power to grant leave to the defendant, in an action for a divorce, to amend a former or supplemental answer alleging adultery on the part of the plaintiff, when discovered after the issues were joined. Upon a motion to amend in such an action, the duty of the court is simply to ascertain whether the defendant has a reasonable prospect of establishing the recriminatory charge. If it thinks she has, this alone will give her the right to amend. *N. Y. Superior Ct. Sp. T.*, 1865, Strong *v.* Strong, 3 *Robertson*, 669.
6. Where the summons and the demand of relief in the complaint are for a remedy at law only,—*e. g.*, the recovery of money,—they render *equitable* relief so far inconsistent "with the case made in the complaint" and excluded "from the issue," within the meaning of section 275 of the Code, that the plaintiff is not entitled to it, if he failed on the trial to establish a right to the *legal* relief. *N. Y. Superior Ct.*, 1863, Towle *v.* Jones, 1 *Robertson*, 87.
7. Evidence of an error in a contract—*Held*, admissible, although the plaintiff had not in his complaint formally asked for a reformation of the contract—on the ground that the court might treat the complaint as amended, so as to conform to the facts. Rosboro *v.* Peck, 48 *Barb.*, 92.
8. The power conferred upon the courts by section 174 of the Code of Procedure, to relieve a party from a proceeding taken against him through

mistake, &c., cannot be exercised after the expiration of the year limited in that section from a notice of the proceeding. Amory *v.* Amory, *Ante*, 16.

9. The general powers of amendment given to courts of record by sections 172 and 173 of the Code of Procedure, do not belong to justices' courts; nor do any of the general provisions in relation to the amendment of process and pleadings, contained in other parts of the Code and in the Revised Statutes, apply to justice's courts. *Supreme Ct.*. 1867, Gilmore *v.* Jacobs, 48 *Barb.*, 336.

10. The return of a sheriff may be amended by leave of court, on proper terms and on due notice, after the commencement of an action for an insufficient and false return. And such return may be read in evidence with the same effect as if originally made in the amended form. *Ct. of Appeals*, 1866, People *v.* Ames, 35 *N. Y.*, 482.

ANIMALS.

Proceedings for the capture and sale of animals found straying upon highways. *Laws of* 1862, 844, ch. 459, amended 2 *Laws of* 1867, 2036, ch. 814.

ANSWER.

1. In actions for the wrongful taking of personal property, the time of taking the property is not essential, provided it be before the commencement of the action. The defendant, in alleging ownership in himself, need not state the precise day when he became the owner. It is sufficient if the answer allege that the defendant, at the time stated in the complaint, and for a long time prior thereto, was the owner. *N. Y. Superior Ct. Sp. T.*, 1863, Bryant *v.* Bryant, 2 *Robertson*, 612.

2. Where an essential allegation of fact in the complaint is denied in the answer "for the want of knowledge sufficient to form a belief," instead of "any knowledge or information sufficient to form a belief," as prescribed by the Code, the denial is insufficient, and consequently the fact alleged in the complaint is admitted. *N. Y. Com. Pl.*, 1867, Heye *v.* Bolles, 33 *How. Pr.*, 266.

3. Denial, by an indorser in his answer, that he ever received notice of presentment, demand, non-payment and protest of the note sued on, is material; hence an answer containing such a denial cannot be struck out as frivolous and sham. *N. Y. Superior Ct.*, 1864, Ward *v.* Waterhouse, 2 *Roberts.* 653.

4. The objection that a statute was not constitutionally passed by ayes and noes, for want of showing the presence of the required number of members, must be set up by answer; otherwise it is unavailable. *N. Y. Superior Ct.*, 1864, Darlington *v.* Mayor, &c. of New York, 2 *Robertson*, 274.

5. If the allegations of a defense are pertinent to the controversy, their suf-

ficiency is only to be tested by demurrer, or on the trial. *N. Y. Superior Ct.*, 1863, Carpenter *v.* Bell, 1 *Robertson*, 711.

6. A motion to compel the defendant to elect upon which of several grounds he will base his defense, is addressed to the discretion of the court, and its decision thereon cannot be reviewed. *Ct. of Appeals*, 1866, Kerr *v.* Hays, 35 *N. Y.*, 331.
7. Section 150 of the Code allows a defendant to set forth as many defenses as he may have; and there is no provision of law that authorizes the court to strike out defenses merely because they are inconsistent. *N. Y. Superior Ct. Sp. T.*, 1863, Bryant *v.* Bryant, 2 *Robertson*, 612.
8. An answer which only denies in general terms those allegations in the complaint which the defendant designates as "material," is evasive, and obnoxious to a motion that it be made more definite and certain. *N. Y. Superior Ct.*, 1863, Mattison *v.* Smith, 1 *Robertson*, 706.
9. The denial should, by its words, so describe the allegations of the complaint intended to be controverted, that any person of intelligence can identify them. *Ib.*
10. The allegation of matter in mitigation of damages, in an answer, is not material; it requires no reply, is not the subject of demurrer, and not being set up as a defense, but as a notice merely, a motion to make such matter more definite and certain cannot be entertained. *N. Y. Superior Ct.*, 1865, Smith *v.* Trafton, 3 *Robertson*, 709.
11. The question whether facts set up in mitigation are or are not such as should be admitted to be given in evidence for that purpose, can only be determined by the presiding judge upon the trial. *Ib.*
12. Where the facts set up in an answer as a counter-claim are neither demurred nor replied to, they are to be taken as true, and the defendant will be entitled to relief thereon. *N. Y. Superior Ct.*, 1865, Lawrence *v.* Bank of the Republic, 3 *Robertson*, 142; reversed on other points, 35 *N. Y.*, 320.

COMPLAINT; DEMURRER; PLEADING; REPLY.

APPEAL.

1. It is the duty of a referee who has heard testimony in an action committed to him to hear and determine, to render a decision. Until some determination has been made by him, the court cannot review his proceedings. *N. Y. Superior Ct. Sp. T.*, 1864, Heerdt *v.* Wetmore, 2 *Robertson* 697.
2. An appeal from a judgment which has been settled, and of which satisfaction has been acknowledged, will not be heard by the court merely to protect the right of the respondent's attorney to costs. If the settlement of the judgment be a fraud on his rights, his remedy is by motion to vacate the entry of satisfaction [18 N. Y., 368], or for an order that the defendant pay his costs. [1 Am. Law Reg. N. S., 410–16.] *N. Y. Superior Ct.*, 1863, Cock *v.* Palmer, 1 *Robertson*, 658.

3. Where a judgment is given for a fixed sum for the plaintiff without costs, and for a like sum for the defendant for costs,—the two judgments to offset each other,—an appeal lies. *Supreme Ct.*, 1866, Howland *v.* Coffin, 47 *Barb.*, 653; S. C., 32 *How. Pr.*, 300.

4. The court of appeals cannot in any case entertain an appeal from a judgment rendered at special term. The judgment must have been appealed to the general term, and have been there determined, before the court of appeals takes jurisdiction, as the Code only authorizes an appeal from an "actual determination" made at a general term. *Ct. of Appeals*, 1867, Potter *v.* Van Vranken, 36 *N. Y.*, 619.

5. When the objection upon which an appeal from the special to the general term was taken, is clearly untenable, and the order appealed from was proper on the merits, the court of appeals will not review the order of the general term upon the ground that the general term should not have *dismissed* the appeal. As the effect of dismissing the appeal in such a case is the same with that of affirming the order, any error in the mode of arriving at the result would be immaterial. Hoe *v.* Sanborn, *Ante*, 189.

6. Under the law of this State, as it stood prior to the constitution of 1846, a decision of a judge at circuit refusing an application for a postponement of the trial of a cause made upon the ground of absence of a material witness, was regarded as so far affecting a substantial right as to be subject to review, and, if erroneous, to reversal. Howard *v.* Freeman, *Ante*, 292.

7. There is nothing in the legislation upon procedure, passed under the constitution of 1846, to change this rule. The power of a judge presiding at the trial of a common law action, to grant or refuse a postponement, must still be exercised according to law; and his decision is reviewable. *Ib.*

8. An order denying a motion for commitment for not obeying a mandamus is appealable. *Supreme Ct.*, 1867, People *ex rel.* O'Brien *v.* Healy, 48 *Barb.*, 564; S. C., 33 *How. Pr.*, 172.

9. The objection that the cause was irregularly put upon the calendar by the plaintiff's counsel, and urged to trial, must be brought before the special term on motion to set aside the verdict, and cannot be alleged as error after the trial has been had. It is not a ground of error affecting the judgment upon an appeal therefrom. *Supreme Ct.*, 1866, Macklem *v.* Marsh, 48 *Barb.*, 267.

10. An order for the discovery of books and papers affects a substantial right, and is appealable. *N. Y. Superior Ct.*, 1863, Woods *v.* De Figaniere, 1 *Robertson*, 681.

11. On the hearing of an order to show cause, where plaintiff was allowed by new affidavits to support his complaint and explain affidavits read by the defendants denying the facts set forth in the papers on which the injunction was granted,—*Held*, that this was an exercise of discretion on the part of the justice at chambers, over which the general term had no control, and which it could not review. *N. Y. Superior Ct.*, 1864, Childs *v.* Fox, 2 *Robertson*, 650.

12. An order extending the time for the plaintiff to sign and file a stipula-

tion which he has omitted, made "in furtherance of the justice of the case," rests in the discretion of the court; and, as it involves no substantial right, is not reviewable upon appeal. It does not belong to either of the classes of orders which, according to the Code, may be re-examined at general term. *N. Y. Superior Ct.*, 1864, Butler *v.* Niles, 3 *Robertson*, 644.

13. An order directing a late sheriff to be made a party in a suit, and allowing the plaintiff to give an undertaking *nunc pro tunc* to said sheriff, and to amend the complaint by inserting an allegation of such delivery, provides for an amendment of the original complaint, and is a matter of discretion, and not appealable. *Supreme Ct.*, 1866, Sayre *v.* Frazer, 47 *Barb.*, 26.

15. An order appointing an appraiser to ascertain the value of property attached, for the purpose of discharging the attachment upon the giving of an undertaking, rests wholly in the discretion of the judge granting it, and is not appealable. *N. Y. Superior Ct.*, 1863, Lupton *v.* Jewett, 1 *Robertson*, 639.

16. Where an adjudication was made after the trial of a case at special term, allowing the plaintiff five days to sign a certain stipulation, and it was adjudged that, in case of his refusing to do so, the complaint should be dismissed,—*Held*, that such adjudication, being by its terms conditional, was not a final determination of the rights of the parties, from which an appeal on that day could be taken. If the plaintiff does not comply with the direction of the order, no further action by the court is necessary, the defendant being entitled by the terms of the order to a judgment of dismissal. *N. Y. Superior Ct.*, 1864, Butler *v.* Niles, 3 *Robertson*, 644.

17. An appeal does not lie from an order granting a motion for judgment on account of the frivolousness of a demurrer to the complaint, under section 247 of the Code. The defendant can only appeal after judgment is rendered for damages and costs, when the decision of the special term may be reviewed on that appeal. *N. Y. Superior Ct.*, 1864, Joannes *v.* Day, 3 *Robertson*, 650.

18. By the amendment of 1860 to section 344 of the Code, an appeal can be taken from an order of a county judge in supplementary proceedings, where the cause originated in a justice's or county court. *Supreme Ct.*, 1865, Crounse *v.* Whipple, 34 *How. Pr.*, 333.

19. An order denying an application of a party who has been dispossessed from real property under a writ of assistance which has since been vacated, to be restored to the possession, is appealable. Chamberlain *v.* Choles, *Ante*, 118.

20. An appeal does not lie from an order of the general term dismissing an appeal from the order of the special term, confirming the report of commissioners of estimate and assessment in proceedings for opening a street in New York City. The confirmation of the commissioners' report by the supreme court is conclusive. [11 N. Y. (1 Kern.), 276.] *Ct. of Appeals*, 1867, King *v.* Mayor, &c. of New York, 36 *N. Y.*, 182.

21. An appeal may be taken to the court of appeals from an order of the

general term affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment. King *v.* Platt, *Ante*, 174.

22. Such an order is final; it affects a substantial right; and it is an order made upon a summary application in an action after judgment. *Ib.*

23. Such an order is not purely discretionary with the court below, in such a sense as to prevent it from being reviewed. *Ib.*

24. An appeal in such a case is in time if taken within two years from the entry of the order. The order is in the nature of a judgment, within the meaning of the Code of Procedure. *Ib.*

25. An appeal does not lie to the court of appeals from an order of the general term dismissing an appeal from an order of the special term denying a motion to re-settle a case. Hoe *v.* Sanborn, *Ante*, 189.

26. An appeal does not lie to the court of appeals from an order of the general term affirming an order of the special term denying a motion to re-tax the costs and correct the judgment roll in respect thereto. *Ib.*

27. But upon an appeal from the *judgment*, the propriety of the *order*, so far as the question of legal right to costs is involved, is reviewable. Any question of the propriety of making a formal correction in the order is a question of practice in the court below, and cannot be raised in the court of appeals. *Ib.*

28. An order of the general term, dismissing an appeal from an order of the special term, described as "an order refusing a *mandamus*," but the papers connected with which were entitled in the action, and gave no indication of proceedings for a mandamus,—*Held*, not appealable to the court of appeals. *Ib.*

29. Where an order is granted upon condition of the payment of costs, accepting the costs under the order is a waiver of any right to appeal from it. *N. Y. Superior Ct.*, 1863, Lupton *v.* Jewett, 1 *Robertson*, 639.

30. A stay of proceedings effected by taking an appeal from a judgment, with the requisite security to procure such stay, operates to suspend proceedings supplementary to execution on the judgment. *N. Y. Superior Ct.*, 1863, Cowdrey *v.* Carpenter, 2 *Robertson*, 601.

31. An appeal from an order overruling a demurrer does not operate, by itself, as a stay of proceedings. Christy *v.* Libby, *Ante*, 423.

32. A stay may be granted by the court; but in ordinary cases only upon terms of defendant giving security. *Ib.*

33. Where a special term motion is heard by a judge at chambers under a stipulation, an order made in the case, to be appealable, should be in form a special term order, and should state nothing about its having been heard at chambers. *Supreme Ct.*, 1865, Kelly *v.* Thayer, 34 *How. Pr.*, 163.

34. An appeal from an order of the county court, granting a new trial, on the judge's minutes, is an enumerated motion; and must be placed upon the calendar, and brought on upon printed papers. Harper *v.* Allyn, *Ante*, 186.

35. On appeal to the general term from an order, all papers used upon the

motion must be served with the notice of appeal, and similar copies must be furnished to the judges on the argument of the appeal. *Supreme Ct.*, 1867, Smith *v.* Chapman, 33 *How. Pr.*, 308.

36. After judgment entered absolutely, without a special order, a case, though made and settled on notice, can not be annexed to the judgment roll, and an appeal, in such case, must be heard on the judgment roll alone. *N. Y. Superior Ct.*, 1863, Anderson *v.* Dickie, 1 *Robertson*, 700.

37. The supreme court, on appeal, can review a judgment of a county court rendered on appeal from a justice's court, on exceptions that are made a part of the record, though the exceptions have been passed upon in the county court, or a motion made in that court for a new trial. *Supreme Ct.*, 1867, Bliss *v.* Schaub, 48 *Barb.*, 339.

38. That on an appeal to the general term from a judge's order at chambers requiring a judgment debtor in supplementary proceedings to pay the judgment, &c., the whole merits of the case are open to review,—see Crouse *v.* Wheeler, 33 *How. Pr.*, 337.

39. An objection which, if taken at the trial, might have been obviated, can not be raised for the first time on appeal. If not taken at the first opportunity, it will be deemed waived. *Supreme Ct.*, 1867, Cheney *v.* Beals, 47 *Barb.*, 523.

40. Attachment proceedings having been received in evidence on the trial, without objection, it is too late, upon appeal, to question their regularity or sufficiency. *Supreme Ct.*, 1866, Happy *v.* Mosher, 47 *Barb.*, 501.

41. On appeal from an order denying a motion to vacate an attachment, it appeared that the affidavit upon which the attachment was granted was sworn before a commissioner in Kentucky; that no certificate of the secretary of state was annexed (as required by *Laws of* 1850, ch. 270); but that it had been read before the judge who granted the warrant, without objection.—*Held*, that the omission might be amended and supplied; that unless the plaintiffs caused the certificate to be annexed to the original affidavit within ten days after notice of this decision, the order should be reversed; if it were so annexed, the order should be affirmed, without costs. *Supreme Ct.*, 1868, Lawton *v.* Reil, 34 *How. Pr.*, 465.

42. Where neither party has excepted to the findings of the court, neither party can object to the report, or review it on appeal. It must be taken as correct. And if exceptions to the report are not inserted in the case, the court will assume that no exceptions were taken. *Supreme Ct.*, 1866, Sutherland *v.* Rose, 47 *Barb.*, 144.

43. Where the evidence given on a trial before a referee is not set forth in the case, the court will not go into an examination to see whether the findings of the referee are sustained by the testimony, but will assume that the findings are true and in accordance with the evidence. *Supreme Ct.*, 1866, Lamb *v.* Grover, 47 *Barb.*, 317.

44. As a general rule, the findings of a referee as to matters of fact can be reviewed only in the court of original jurisdiction, and not in the court of

appeals. *Ct. of Appeals*, 1866, Reed *v.* Board of Education of Brooklyn, 33 *How. Pr.*, 237.

45. Findings of fact by a judge at special term must be deemed conclusive, unless they are without evidence to support them, or clearly against evidence. [6 Bosw., 213; 8 Id., 574; Id., 679.] *N. Y. Superior Ct.*, 1865, Loeschigk *v.* Peck, 3 *Robertson*, 700.

46. There is no power in the court of appeals nor in the general term of the supreme court, to review questions of fact upon appeal, where the trial is had before a jury. The jury are competent judges of the sufficiency of the evidence submitted to them, and their finding is conclusive. *Ct. of Appeals*, 1867, Parker *v.* Jervis, 34 *How. Pr.*, 254.

47. Where there is some evidence to sustain a verdict, the court is not at liberty, upon exceptions only, to disturb the verdict on the ground that it it is unsupported by the evidence. *Supreme Ct.*, 1867, Green *v.* Roberts, 47 *Barb.*, 521.

48. Where issues are presented by the pleadings it is the duty of the court below, when requested, to find every material fact necessary for their determination. But the mere allegation in the case that the court was requested to find certain facts, which it refused to do, presents nothing for the consideration of the appellate court. To bring before the court of appeals, for review, the refusal of the court below to find a fact, the case must show an offer of the evidence, a refusal to admit it, and an exception to the ruling of the court thereon. *Ct. of Appeals*, 1866, Casler *v.* Shipman, 35 *N. Y.*, 533.

49. It is an error of law, reviewable upon appeal to the court of appeals, for a court to find a fact of which no proof whatever is made. Brush *v.* Lee, *Ante*, 204.

50. But to render the objection available in the court of appeals, the proper exception must be taken in the court below, on behalf of the party injured. If the fact found, if true, sustains the judgment appealed from, and no exception appears to have been taken to the defect of proof, the court of appeals will affirm the judgment, however deficient the proof may be. *Ib.*

51. The court of appeals can only look at the return of the court below for the facts upon which its judgment is to be given. Facts stated in the opinion of the court below, or elsewhere, but not found in the return, can not be regarded. *Ct. of Appeals*, 1864, McGregor *v.* Buell, 33 *How. Pr.*, 450.

52. That the court of appeals will not review a judgment on the report of the referee, upon the ground of error in fact; but will presume that a reversal of such judgment by the supreme court was for error in law,—see Marco *v.* Liverpool, &c. Ins. Co., 35 *N. Y.*, 664.

53. The provision of section 268 of the Code, that a judgment reversed at general term "shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal," does not apply to orders

made on special motion upon affidavits. *Ct. of Appeals*, 1866, Williams *v.* Hemon, 33 *How. Pr.*, 241.

54. Questions of the constitutionality of a law are never considered in the court of appeals, unless they are essential to the determination of the appeal. *Ct. of Appeals*, 1865, People *ex rel.* Wetmore *v.* Supervisors of New York, 34 *How. Pr.*, 379.

55. The authority of the general term, upon appeals from the special term, is not confined to a simple reversal or affirmance; but it may make such order as the special term should have made in the first instance. Howard *v.* Freeman, *Ante*, 292.

56. Where, upon appeal, it appears that the judgment below is substantially correct, subject to such modifications as the appellate court can make, the modifications will be made, and the judgments below will be affirmed, with such modifications. *Ct. of Appeals*, 1866, Casler *v.* Shipman, 35 *N. Y.*, 533.

57. Where a portion of an order appealed from is void for want of jurisdiction in the court below, so much of the order may be reversed. The fact that it is void does not necessarily prevent the appellate court from reversing it. *Ct. of Appeals*, 1867, People *ex rel.* Robinson *v.* Ferris, 36 *N. Y.*, 218; S. C., 34 *How. Pr.*, 189.

58. Upon an appeal from a judgment of a county court to the supreme court, the successful party is entitled to the full costs given by subdivision 5 of section 307 of the Code of Procedure. Gray *v.* Hannah, *Ante*, 183.

59. The right to those costs being given by statute, any provision in the order of the supreme court determining the appeal, which purports to limit the costs to a less sum,—*e. g.*, a provision awarding motion costs only,—is a nullity. *Ib.*

60. Entering an order containing such a provision is not a waiver of the statutory costs. *Ib.*

61. On entering judgment of the general term affirming a judgment of the special term, costs of the appeal only should be entered. It is not proper to include in the judgment the cost of the action already included in the judgment affirmed. [6 How. Pr., 462; 1 Abb. Pr., 130; 15 Id., 367.] *Ct. of Appeals*, 1867, Beardsley *v.* Foster, 36 *N. Y.*, 561; S. C., 34 *How. Pr.*, 97.

62. But if the costs awarded at special term are improperly embraced in the record of the judgment of affirmance by the general term, the proper mode of correcting the error is by motion in the court below. The error is not one for which the judgment of the general term can be reversed by the court of appeals. *Ib.*

63. It is not proper for the court below, on the return of the *remittitur* from the court of appeals, to add any new and independent direction to the judgment of that court, beyond what is required to carry that judgment into effect; not even a provision for costs of the appeal. *Ct. of Appeals*, 1864, McGregor *v.* Buell, 33 *How. Pr.*, 450.

64. No appeal can be brought to the court of appeals until the court below, by its judgment, has finally disposed of the whole matter before it, includ-

ing the right to costs, as well as other rights of the parties. If the judgment of the court of appeals fails to determine any part of the subject of the appeal, the defect cannot be supplied by the court below. *Ib.*

MECHANIC'S LIEN.

APPEARANCE.

1. Where a defendant applies for, and obtains, an order from the court giving him time to answer, and serves that order, with a notice signed by an attorney as "attorney for the defendant," this is an act in the progress of the cause, and a submission to the jurisdiction of the court, which is equivalent to an appearance. *Supreme Ct.*, 1866, Ayres *v.* Western R. R. Corp., 48 *Barb.*, 132; S. C., 32 *How. Pr.*, 351.
2. Where an attorney appears before a referee, for parties interested, and having filed exceptions to the report as such attorney, is heard on behalf of such parties before the court at special term, upon the report, such appearance will be deemed a complete appearance; notwithstanding the attorney limits his appearance as being to object to the proceedings for irregularity because of want of notice to his clients. The limitation, under such circumstances, is void for incompatibility. *N. Y. Superior Ct.*, 1864, Ballard *v.* Burrowes, 2 *Robertson*, 206.

ARBITRATION.

1. Under the provisions of the Revised Statutes relative to the submission of controversies to arbitration, no *judgment* can be entered upon an award of arbitrators, unless the submission is proved by the affidavit of a subscribing witness. When, therefore, the submission is not attested by any subscribing witness, any judgment entered upon it is irregular, and should be set aside on motion. Goodsell *v.* Phillips, *Ante*, 147.
2. An award founded on an unattested submission may, however, be enforced by action. *Ib.*
3. The objection to the propriety of entering judgment upon an award founded upon a submission unattested by a subscribing witness, is not waived by attending and proceeding before the arbitrators, pursuant to such submission. *Ib.*
4. An award of arbitrators cannot be enforced by a judgment, under the provisions of the Revised Statutes, unless it is made pursuant to the written submission. Matter of Schafer, *Ante*, 234.
5. Where an award is not made within the time prescribed by the original submission, but within an oral extension given by the parties, it may be valid as an award, and enforceable by action, but cannot be the basis of a judgment. *Ib.*

ARREST.

1. Where an attorney has received money for his client, as his attorney, no part of which he pays over, the client has a right, as of course, to an order of arrest under subdivision 2 of section 179 of the Code: and, upon obtaining judgment, can issue execution against the person of the attorney, irrespective of any order of arrest having been granted. *N. Y. Superior Ct. Sp. T.*, 1864, Gross *v.* Graves, 2 *Robertson*, 707.
2. In an action by the purchaser of land after the vendor has failed to make title free of incumbrances, as required by the contract of sale, to recover back a part payment of the purchase money, the plaintiff is not entitled to an order of arrest on the ground that he was induced to enter into the contract of sale by defendant's falsely stating that he was the owner of the property. Such representations have no connection with the contracting the debt, or incurring the obligation for which the action is brought, viz., the engagement to convey free of incumbrances. *Supreme Ct.*, 1866, Oatley *v.* Lewin, 47 *Barb.*, 18.
3. An order of arrest can not be granted on showing that the property has been removed or concealed by the defendant, merely. It must also be shown that such removal or concealment was with intent that it should not be found or taken by the sheriff, or with the intent to deprive the plaintiff of it. *N. Y. Com. Pleas*, 1867, Watson *v.* McGuire, 33 *How. Pr.*, 87.
4. The mere fact that a party intends to remove from the State will not justify an arrest under subdivision 2 of section 179 of the Code. The intention to defraud his creditors must be shown in some direct way. An honest intention is always to be supposed. *Supreme Ct.*, 1862, Flour City National Bank of Rochester *v.* Hall, 33 *How. Pr.*, 1.
5. A defendant in an action pending in court was arrested in the street, near the court room, but before the court commenced its session. He had gone to attend either the trial or proceedings for the removal of the cause to another court, upon justification of sureties, and, when arrested, was leaving to go home because he thought nothing would be done.—*Held*, that he was entitled to go to ascertain if anything would be done in the action, and to return unmolested; and that merely stopping to announce to the counsel for the opposite party that no steps would be taken, was not such a deviation from his journey as justified his arrest. *N. Y. Superior Ct. Sp. T.*, 1864, Salhinger *v.* Adler, 2 *Robertson*, 704.
6. To sustain an order of arrest, a plaintiff is bound to make out his case beyond a doubt. *N. Y. Superior Ct. Sp. T.*, 1865, Mulry *v.* Collett, 3 *Robertson*, 716.
7. Where an order of arrest is founded upon the nature of the cause of action itself, and not upon extrinsic facts, the court will not, in general, vacate the order, upon affidavits denying the cause of action. Stuyvesant *v.*

Bowran, *Ante*, 270. S. P., *N. Y. Superior Ct.*, 1865, Merwin *v.* Playford, 3 *Robertson*, 702.

8. If this can be done in any case, it can only be where all doubt is removed. and the state of facts shown would warrant the judge in directing a nonsuit at the trial. Stuyvesant *v.* Bowran, *Ante*, 270.

9. In an action for deceit, where the ground of the recovery is the fraud, if the plaintiff swears to a good cause of action, he is entitled to retain his order of arrest. On a motion to vacate the order, the merits of the case cannot be tried on affidavits. *Supreme Ct.*, 1866, Ely *v.* Mumford, 47 *Barb.*, 629.

10. If defendant in an action for conversion moves to vacate an order of arrest granted upon an affidavit averring a demand of the property from him, it is for him to show that timely objection to the authority of the agent making the demand was made; or that the defendant had rightfully a lien upon the property at the time of demand; if he relies upon either of those facts as an objection to the validity of it. Ballouhey *v.* Cadot, *Ante*, 122.

11. A defendant who has appeared generally in an action cannot afterwards avail himself, on a motion to vacate an order of arrest, of an objection that the Christian names of the plaintiffs are not stated in the papers on which the order of arrest was obtained. *Ib.*

12. On motion to vacate an order of arrest made upon the original papers only, if the necessary facts are positively sworn to in the plaintiff's affidavit, and if deponent can have had knowledge of them, the court will not vacate the order on the ground that the statements which it contains were probably not within his knowledge. *Ib.*

13. When a defendant, against whom an order of arrest has been issued, moves to vacate it, upon the ground that an action on the debt alleged has been barred by a discharge in insolvency, granted under either of the statutes of New York upon that subject, the court has power to examine into the validity of the discharge. American Flask & Cap Co. *v.* Son, *Ante*, 333.

14. Where a person is arrested upon a criminal warrant, and brought before a police justice, the police justice is deprived of further jurisdiction in the case, on the prisoner's entering a recognizance to appear at the court of general sessions. Any further proceedings in the case by the justice are a nullity. *N. Y. Com. Pleas Sp. T.*, 1867, Sandrock *v.* Knop, 34 *How. Pr.*, 191.

ASSIGNMENT.

1. The right of action for damages for the breach of a covenant against incumbrances may pass, in equity, as an incident, by force of a conveyance of the land itself as the principal thing. Roberts *v.* Levy, *Ante*, 311.

2. Proceedings authorized to compel an assignee for the benefit of creditors to render an accounting before a county judge. 2 *Laws of* 1867, 2163, ch. 860, § 1; amending *Laws of* 1860, 595, ch. 348, § 4.

ASSISTANCE (WRIT OF).

1. The general rule is, that when a judgment, order or decree has been reversed or vacated, restitution will be made of all property and rights which have been lost by reason of it. Chamberlain *v.* Choles, *Ante*, 118.
2. The case of vacating a writ of assistance forms no exception to this rule. The order which vacated it should make provision for reinstating any one who may have been dispossessed under the vacated writ, whether such party shows title to the possession or not. *Ib.*

ASSOCIATIONS.

1. The Open Board of Brokers in the City of New York is not a corporation; nor is it a joint stock association; nor is it, as respects questions relating to the continuance or termination of membership in it, a partnership. White *v.* Brownell, *Ante*, 318.
2. That board is a voluntary association of persons who, for convenience, have associated to provide, at the common expense, a common place for the transaction of their individual business as brokers. *Ib.*
3. The agreement which the members of such an association have made, upon the subject of membership, and what shall be the terms on which it shall be acquired, and the grounds and proceedings upon which it shall be terminated, must determine the rights of parties on that subject. A court of justice must recognize and enforce these provisions of the compact. It cannot substitute another contract for the one which the parties have made. *Ib.*
4. One who becomes a member in a voluntary association whose rules provide for expulsion upon certain grounds, and direct a mode of proceeding before a committee or tribunal of the association to ascertain whether, in a given case, such grounds exist, submits himself to these rules; and cannot, when they are invoked against himself (nothing unlawful or unconscientious in them being shown), resort to a court of justice to prevent them from being put in force. An injunction against the tribunal of the association, or against an officer of the association charged with executing the decision of such tribunal, will not lie. *Ib.*
5. Provisions of the constitution and by-laws of the Open Board of Brokers in the City of New York, authorizing the expulsion of a member who should fail to perform contracts made at board with another member,—examined, and adjudged not unreasonable. *Ib.*

ATTACHMENT.

1. The attachment authorized by section 227 of the Code of Procedure is allowable in actions for legal relief only. It cannot be issued in an action for equitable relief,—*e. g.*, an action seeking to have a deed canceled, and an accounting and an injunction and receiver. Ebner *v.* Bradford, *Ante*, 248.
2. An action in which the plaintiff seeks to enforce a contract of sale, and to recover the purchase money agreed to be paid by the defendant, is "an action for the recovery of money," within the meaning of section 227 of the Code of Procedure,—authorizing attachments,—notwithstanding incidental relief is necessary before a money judgment can be rendered in the action. The word "action," as used in the chapter of the Code relating to attachments, embraces all civil actions, and the court cannot limit it by reason of any previously recognized distinction between actions at law and suits in equity. *Supreme Ct.*, 1866, Corson *v.* Ball, 47 *Barb.*, 452.
3. An action against a common carrier to recover damages for the loss by negligence of goods entrusted to his care, is not an action arising on *contract*, within the meaning of section 227 of the Code. *Supreme Ct.*, 1866, Atlantic Mutual Ins. Co. *v.* McLoon, 48 *Barb.*, 27.
4. That the action should be for the recovery of money, that it should be on contract, that the plaintiff should specify the amount of the claim and the grounds of the demand, and that the defendant should be a non-resident, is enough to warrant an attachment. *Supreme Ct.*, 1868, Lawton *v.* Reil, 34 *How. Pr.*, 465.
5. Hence an attachment may be issued in an action for damages arising upon a breach of contract,—*e. g.*, for damages for defendant's purchasing unsound goods for the plaintiff, under a contract to purchase goods of a sound quality. Such a claim arises on contract, and the amount claimed is a fixed amount, being the difference between the amount paid and the amount at which it was sold. *Ib.*
6. The threat of a debtor that if sued, he will turn over all his property, and the creditor "shall not get a cent," is evidence of fraudulent intent, and, on being proved, will warrant an order of attachment being issued. *N. Y. Superior Ct. Sp. T.*, 1864, Livermore *v.* Rhodes, 3 *Robertson*, 626.
7. The Code does not authorize an attachment, as a provisional remedy, in an action against a non-resident for the taking and conversion of personal property in another State. *N. Y. Superior Ct.*, 1865, Knox *v.* Mason, 3 *Robertson*, 681.
8. National banks, organized and doing business under the act of Congress, are to be regarded as *foreign* corporations within the provisions of the Code of Procedure, authorizing actions to be brought and attachments to be issued against corporations "created by or under the laws of any other State, government or country." These terms are intended to include all corporations formed under the laws of any other government than the one

enacting the law, even though that government should not be the government of another State or country, which plainly includes the government of the United States. And the words "foreign corporation," afterwards used in sections 229 to 239 were intended to include and refer to the corporations comprehended within the general language of section 227, and to be equally extended in their legal import; and, as so understood, they include corporations formed under the laws of the United States; for that is a government other and different from the one speaking through the law under consideration. *So held*, where the bank was organized and located within this State. *Supreme Ct.*, 1867, Bowen *v.* First National Bank of Medina, 34 *How. Pr.*, 408.

9. A national bank is a "foreign corporation," within the meaning of that term as defined in section 227 of the Code of Procedure; and its property in this State is liable to be attached in an action against it, to the same extent as that of foreign corporations generally. *So held*, where the bank was organized and located in another State. Cooke *v.* State National Bank of Boston, *Ante*, 339.
10. The Code of Procedure does not authorize the issuing of an attachment as a provisional remedy against a *domestic* corporation. Ferrier *v.* American Glass Silvering Co., *Ante*, 419.
11. The various sections of the Code governing attachments,—construed. *Ib.*
12. An attachment can be allowed, issued, and served, before the service of the summons is fully completed. *Supreme Ct.*, 1866, Corson *v.* Ball, 47 *Barb.*, 452.
13. The proper course of proceeding in attaching property incapable of manual delivery,—stated. Mechanics' & Traders' Bank of Jersey City *v.* Dakin, 33 *How. Pr.*, 316.
14. Section 236 of the Code does not authorize the examination of a person who, on being applied to by the sheriff, does not *refuse* to give the certificate therein mentioned, but gives the only certificate that he can give. *Supreme Ct.*, 1866, Reynolds *v.* Fisher, 48 *Barb.*, 146.
15. Where an affidavit to procure an attachment omits to state the ground of the cause of action, the omission affects the jurisdiction, and can not be remedied by amendment. The attachment must be set aside. *N. Y. Superior Ct. Sp. T.*, 1867, Zeregal *v.* Benoist, 33 *How. Pr.*, 129.
16. It is good ground for vacating an attachment, issued against an alleged non-resident and absconding defendant, that his absence from his place of abode was open and notorious; that he made no efforts to conceal the same; that his conduct was not designed to place any one on a false scent, or to evade service of process; and that he omitted nothing which he was legally bonnd to do, to enable the plaintiff to find him. The mere failure of a plaintiff to learn the whereabouts of a defendant affords no evidence of culpable conduct on his part. Swezey *v.* Bartlett, *Ante*, 444.
17. The rule that a motion to discharge an attachment, if founded upon an irregularity, must be made at the earliest opportunity, or the delay ex-

cused does not apply to motions for relief affecting the substantial rights of parties. *Ib.*

18. It is not necessary that a motion to vacate an attachment should be made before judgment; and an order of court granting a motion to open a default, but allowing the judgment entered to stand as security, does not preclude the defendant from afterwards moving to vacate the judgment. *So held*, where the objection to the attachment went to the jurisdiction. *Ib.*

19. The Code contains no express limitation of the time within which a motion must be made to set aside an attachment. A motion to set aside the attachment for irregularity may be made after judgment obtained and execution issued in the action. *Supreme Ct.*, 1867, Bowen *v.* First National Bank of Medina, 34 *How. Pr.*, 408.

ATTORNEY AND CLIENT.

1. There is no rule precluding an attorney from entering into agreement with one who is not an attorney, to enter his office and act as his clerk, and compensating him by giving him an interest in the business. An execution issued in the name of the employer is not invalid because it was in fact issued by a clerk so employed. Brush *v.* Lee, *Ante*, 204.

2. The functions of the attorney of record of a plaintiff cease upon the death of his principal, notwithstanding the operation of a special statute preventing the abatement of the action. *N. Y. Superior Ct. Sp. T.*, 1864, Livingston *v.* Olyphant, 3 *Robertson*, 639.

3. A trustee or guardian is personally responsible to an agent or attorney employed by him professionally, in the execution of his duty, and not the estate or fund under his care. *N. Y. Superior Ct.*, 1864, Bowman *v.* Tallman, 2 *Robertson*, 385.

4. In an action by an attorney retained to conduct a cause pending on appeal, for compensation for the services employed, evidence that there were in fact no merits in the case he was engaged to present, is irrelevant. Case *v.* Hotchkiss, *Ante*, 381.

5. An account rendered by an attorney to his client, containing his charges for professional services, if retained without objection, becomes an account stated, and draws interest from the time it was rendered. *Ib.*

6. In an action by an attorney for his fees, defended on the ground of champerty, it appeared that the client agreed with the attorney to commence the suit, and he agreed to give the attorney two-thirds of the proceeds, he to furnish all lawyer's expenses, and everything else.—*Held*, that such an agreement is not a violation of the provision of the Revised Statutes. [2 Rev. Stat., 288, § 71; 18 N. Y., 368.] *N. Y. Superior Ct.*, 1864, Fogerty *v.* Jordan, 2 *Robertson*, 319.

BAIL.

1. A surety upon an undertaking given in an action for claim and delivery of personal property, who rents and occupies a portion of a building as an office for business purposes within the State, is to be deemed a "householder," for all the purposes of bail. *Supreme Ct. Sp. T.*, 1867, Somerset Savings Bank *v.* Huyck, 33 *How. Pr.*, 323.
2. A motion to refund money deposited instead of bail, pursuant to section 197 of the Code of Procedure, cannot be made until after the giving and justification of bail. Herrmann *v.* Aaronson, *Ante*, 389.
3. Under section 199 of the Code, the court is authorized to refund the money to the defendant, alone. *Ib.*
4. *It seems*, however, that if there are no conflicting claims made to the money, the court may, at a proper time, make an order that the money be paid to a third person who is shown to have advanced it to the defendant on his arrest. *Ib.*
5. Where, upon the issuing an order of arrest, the defendant makes or procures to be made a deposit of money in lieu of giving bail, and the money remains on deposit up to the time when the plaintiff obtains judgment in the action, the plaintiff is entitled to have it applied in satisfaction of such judgment. *Ib.*
6. The fact that such money was the property of a third person, and was deposited under a special receipt stipulating that it should be returned on the surrender of the defendant, can make no difference. A deposit made in lieu of giving bail, from whatever source derived, must be treated, as between the plaintiff and defendant, as the property of the defendant. *Ib.*
7. Special bail, fixed as such, cannot in an action against them as such, show, either in bar of the action or in mitigation of damages, that they were, before the recovery of judgment against their principal, and at all times since have been, utterly insolvent, and had no property whatever that could or was liable to be applied toward the payment of such judgment. *N. Y. Superior Ct.*, 1863, Levy *v.* Nicholas, 1 *Robertson*, 614.

BILL OF PARTICULARS.

1. It is not necessary, in an action for a claim for having completed a piece of work by numerous successive acts of service, all contributing to such work, to set out, in the plaintiff's bill of particulars, each service so contributing, and its character. *N. Y. Superior Ct. Sp. T.*, 1864, Johnson *v.* Mallory, 2 *Robertson*, 681.
2. Even if a court has the power to order a bill of particulars after the issues have been referred to a referee to hear and determine, it will not be exercised to interrupt a trial actually proceeding before such referee. *N. Y. Superior Ct. Sp. T.*, 1864, Cadwell *v.* Goodenough, 2 *Robertson*, 706.

3. There can be no necessity for a formal written bill of items, during the trial of an action, when the plaintiff can, upon cross-examination, be compelled to disclose the nature of the claim with the nicest particularity. *Ib.*
4. What is meant by the word "account," as employed in section 158 of the Code of Procedure,—considered. Johnson *v.* Mallory, 2 *Robertson*, 681.
5. Where an answer in an action on a money demand sets up a full and complete defense, by averring payment of the whole amount demanded by plaintiff, and satisfaction of the claim, the plaintiff cannot require a bill of particulars of the payment set up in the answer, under section 158 of the Code. *N. Y. Superior Ct.*, 1864, Watt *v.* Watt, 2 *Robertson*, 685.
6. In an action for an accounting, where the defense is payment, an order directing the defendant to serve on plaintiff a bill of items of the alleged payments, or show cause, &c., is not appealable. *Ib.*

CAUSE OF ACTION.

1. An indorser who pays the amount of a note to a holder, under a mistaken belief, founded on statements of the holder, that he, the indorser, has been duly charged, or that a prior indorser has been, may, on discovering that he was not so charged, maintain an action to recover back the amount paid. Lake *v.* Artisans' Bank, *Ante*, 209.
2. To constitute a payment voluntary within the rule that a voluntary payment cannot be recovered back, it must be made with a full knowledge of all material facts. *Ib.*
3. Under the act of Apr. 13, 1855,—giving to a person whose property shall be destroyed or injured "in consequence of any mob or riot," a right of action against the city or county for the damages sustained,—an action lies to recover the value of property *appropriated and carried away* by the persons composing the mob, as well as of that which was *destroyed*. *Supreme Ct.*, 1866, Sarles *v.* Mayor, &c. of New York, 47 *Barb.*, 447.
4. An action for claim and delivery of personal property may be brought against the wrongdoer, although he has parted with the possession of the property before the commencement of the action. Hence, where the defendant was charged with fraudulently obtaining the plaintiff's property, and with having placed it on board of a vessel, and consigned to his uncle, in London, and it was alleged that the defendant had drawn drafts upon the bill of lading, payable when the property should arrive;—*Held*, that the case came within the rule; and that the plaintiffs could recover the value of the goods, if possession could not be delivered. *Supreme Ct.*, 1867, Ellis *v.* Lersner, 48 *Barb.*, 539.
5. The fact that a plaintiff suffers a loss of profits in his trade by a competition in business set up by the defendant, cannot, ordinarily, be regarded as constituting special damage, such as will sustain an action. Masterson *v.* Short, *Ante*, 154.
6. Where property levied upon is left in the possession of the defendant in

the execution, he takes it as the mere servant or agent of the officer, and can not sue for the conversion of, or injury to, the property seized. The property is in the custody of the law. *N. Y. Superior Ct. Sp. T.*, 1866, Smith *v.* Reeves, 33 *How. Pr.*, 183.

7. That an action does not lie to recover personal property, subject to execution, from an officer who holds it under a tax warrant against the plaintiff, regular upon its face, and issued by the proper authorities,—see Hudler *v.* Golden, 36 *N. Y.*, 446.

8. An action may be maintained by a grantee or assignee of property, in his own name, to set aside a prior conveyance or assignment of the same property, by the former owner, alleged to be void as having been procured from the former owner by fraud. McMahon *v.* Allen, *Ante*, 74.

9. The alienation of the affections of a wife, and the loss of her aid and assistance in domestic affairs, constitutes a cause of action against the person causing such alienation, although there be no actual physical absence of the wife from her husband. *Supreme Ct.*, 1866, Heermance *v.* James, 47 *Barb.*, 120.

10. Separation is the usual consequence of interference between husband and wife, and the cases found in the books are cases of actual separation from the house and home of the husband. But an allegation of pecuniary loss, or loss of services by an actual leaving or continuing away from service, is not necessary to make out a cause of action. The gist of the action is the loss of the comfort and society of the wife. [5 Durnf. & E., 357; 5 Johns., 207; Willes, 581; 21 Barb., 441; 4 Id., 327; 30 Id., 663; Bish. Marr. & D., §§ 777–779; 2 Litt., 337; 2 Ired., 35.] The separation which occasions the real injury consists in the alienation of affection, the loss of comfort, of fellowship, society, aid and assistance in domestic affairs; the loss of conjugal rights. *Ib.*

11. An action is not maintainable, under the statutes of this State, against a married woman, to recover for articles sold to her, when she is not engaged in carrying on any trade or business, and has no separate estate. Schmitt *v.* Costa, *Ante*, 188.

12. In an action by one claiming under the grantor in a perpetual lease made subject to a rent charge, brought to recover possession of the premises, upon the ground of a breach of the condition to pay the rent, where the defendant claims an extinguishment of the rent charge by a technical legal merger, the plaintiff may rebut that defense by showing that in equity no merger has taken place. Sheehan *v.* Hamilton, *Ante*, 197.

13. It is not necessary, under the Code of Procedure, in such a case, that the plaintiff should resort to a separate action of an equity nature, to have the existence of the rent charge declared. The whole merits of the controversy may be tried in the action to recover possession of the land for the non-payment of the rent, notwithstanding the facts relating to the alleged merger would have been, before the Code, of equitable cognizance. *Ib.*

14. The cases upon the union of legal and equitable remedies e
the Code of Procedure,—reviewed. *Ib.*

15. An action for the breach of a covenant upon the part of a
will make repairs during the term of the lease; or upon a cov
will not make alterations in the leased premises, without th
the lessor, may be maintained by the lessor without awaiti
ation of the lease. Webster *v.* Nosser, *Ante*, 39.

16. A highway having been laid out by the commissioners
through the plaintiff's farm, commissioners appointed by the
assessed his damages at $185. On appeal from this assessme
assessed the damages of the plaintiff at $355. The defendant,
visor of the town, was requested by the plaintiff to lay this
ment before the board of supervisors,—which the defendant r
claiming that the assessment was invalid and illegal.—*Held*,
refusal of the defendant to perform a duty imposed upon hi
action could be maintained against him by the plaintiff to
damages caused by such refusal, within the rule that an act
may be maintained against a public officer acting by indepen
ity, and not merely as an agent, for a violation of a ministeris
lute, certain, and imperative in its nature, imposed upon him
specifically due to a particular individual as distinguished fro
public. *Supreme Ct.*, 1866, Clark *v.* Miller, 47 *Barb.*, 38.

17. Where the supervisors have jurisdiction to issue the tax w
will not be liable in trespass because they have erred in allov
proper item. *Ct. of Appeals*, 1866, Parish *v.* Golden, 35 *N. Y*

18. The office of assessor, in determining what property is subj
what is exempt from taxation, is judicial; and the assessor, in
such questions, acts judicially; and is not liable for errors c
arriving at his conclusions upon that subject. *Ct. of Appeals*,
hyte *v.* Shepherd, 35 *N. Y.*, 238.

19. Where assessors have jurisdiction to make an assessment, a
ute gives them power to entertain an application for a red
power to retain the assessment as originally made, and to di
testimony of the applicant if it is not satisfactory to them, this
function. Even if they err in the exercise of the power, no ac
against them for the error. [Distinguishing 5 Barb., 607.] *S*
1866, Vose *v.* Willard, 47 *Barb.*, 320.

20. The necessity of showing loss of service as the basis of the
tion for seduction of the plaintiff's daughter,—explained.
Miller, 47 *Barb.*, 47.

21. *It seems*, that an action may be maintained against a telegrap
by the *receiver* of a message, for indemnity for a liability incur
in consequence of an error occurring in the message, through t
the company in transmitting it; such right of action being foun
contract, but on the *misfeasance* of the company, and their cons

bility for the natural and proximate consequences of their neglect. Rose *v.* United States Telegraph Co., *Ante*, 408.

22. But such action can only be incurred by one who has in his own right incurred the liability for which he seeks reimbursement. It does not lie in behalf of one who acted as mere agent, and has voluntarily paid a demand for which his principal, and not he, was liable. *Ib.*

23. T. & Co. sent a message by the defendants' telegraph, to the plaintiff, a broker, directing him to sell for them *five hundred* barrels, &c. The defendants transmitted the message reading *five thousand* barrels; and the plaintiff, on the faith of it, made contracts on behalf of T. & Co. for the sale of that quantity. T. & Co. repudiated the contracts. The article rose. The plaintiff paid the difference to the purchasers, and sued the telegraph company to recover the amount, and his commissions on the sale. —*Held*, that the plaintiff, having acted as agent only, was not liable upon the contracts, and was not the proper party to recover the loss from the company. *Ib.*

24. An owner of the fee of land, although out of possession, may maintain an action for wrongfully working a quarry upon the land to the injury of the inheritance. *Ct. of Appeals*, 1866, Freer *v.* Stotenbur, 34 *How. Pr.*, 440.

COMPLAINT; CONTRACTS; CORPORATIONS, 2; FRAUD; INJUNCTION; JOINDER OF ACTIONS; MALICIOUS PROSECUTION.

CERTIORARI.

1. Where a common law certiorari is directed to the board of commissioners of highways to bring up the proceedings and determination of such officers for review, the supreme court can only affirm or reverse their proceedings or decision. If the court goes further, and sets aside the order appointing the referees, and orders the appointment of a new board, it acts without jurisdiction, and such part of the order will be void. *Ct. of Appeals*, 1867, People *ex rel.* Gilbert *v.* Ferris, 36 *N. Y.*, 218; S. C., 34 *How. Pr.*, 189.

2. On an application for a writ of certiorari to remove a conviction from a court of special sessions to the court of sessions, it is not necessary that the complaint made before issuing the warrant be either in writing or under oath. *Troy Ct. of Sessions*, 1868, Matter of Boswell, 34 *How. Pr.*, 347.

CHATTEL MORTGAGE.

When refiling is proper; and when formal foreclosure is necessary,—see Hulsen *v.* Walter, 34 *How. Pr.*, 385.

CITY JUDGE.

1. The city judge of the city of New York has no authority to *habeas corpus*. *Ct. of Appeals*, 1867, Nash *v.* People, 36 *N.*
2. The legislation relative to the city judge,—reviewed. *Ib.*

CLAIM AND DELIVERY.

1. The Code does not provide for any other undertaking, in an claim and delivery of personal property, than that to be t proved by the sheriff, however inadequate the amount may it is given. *N. Y. Superior Ct. Chambers*, 1865, De Regu *Robertson*, 708.
2. A requisition in proceedings of claim and delivery to reco of goods, in an action brought for the purpose, against one w them at a wrongful sale, will justify the sheriff in seizing th the defendant acted as a mere agent in the purchase, if th served and the seizure made while the goods are actually i ant's possession. *N. Y. Superior Ct.*, 1863, Haskins *v.* Kel *son*, 161.

CAUSE OF ACTION, 4.

COMPLAINT.

1. Under the Code of Procedure the complaint may embrace b equitable causes of action. *Ct. of Appeals*, 1867, Davis *v.* M *Y.*, 569.
2. Under the Code of Procedure, the plaintiff may unite in th plaint a claim to recover real property with damages for the thereof. [Code, § 167; 12 Barb., 481; 17 How., 57–64.] It optional with the plaintiff to unite the claims in one action, o arate action, after the recovery in ejectment, for the damage tainly clear that he may unite the two claims. *Ct. of Appeals* devoort *v.* Gould, 36 *N. Y.*, 639.
3. That a complaint is not defective in substance for omitting t clusions which are to be implied from other facts sufficiently Case *v.* Carroll, 35 *N. Y.*, 385.
4. A complaint in an action against a corporation is not de omitting to allege that the defendants have express authori charter to exercise powers granted by the general laws relati rations. [2 Rev. Stat., 5th ed., 439.] *N. Y. Superior Ct. S* Feeney *v.* Peoples' Fire Ins. Co., 2 *Robertson*, 599.
5. A complaint in a particular case,—*Held*, insufficient as a *credit*

cause it did not aver that the execution had been returned unsatisfied; and insufficient as a complaint for a *specific performance*, because it did not show that the plaintiff was either party or privy to the contract set up. Beardsley *v.* Foster, 36 *N. Y.*, 561.

6. A complaint which only alleges in substance that the defendant maliciously, and with intent to injure the plaintiff, illegally and without warrant arrested, and by force compelled him to go to a police station, and there restrained him of his liberty, merely states a cause of action for illegal arrest or false imprisonment, and not one for malicious prosecution. *N. Y. Superior Ct.*, 1863, Burns *v.* Erben, 1 *Robertson*, 555.
7. An action may be maintained by a wife against her husband, to recover for wrongfully taking and converting to his own use money which was the separate property of the wife. Whitney *v.* Whitney, *Ante*, 350.
8. In such action the complaint is not open to objection because it demands judgment for the sum of money alleged to have been converted. A prayer for an accounting is not the only form of relief allowable. *Ib.*
9. An averment in the complaint that the defendant, a married woman, who carried on a separate business, represented at the time of making the contract sued upon that it was for the uses of such business, is sufficient upon demurrer. If the contract was not in fact for the use of such business, that fact must be alleged by way of defense. *N. Y. Superior Ct.*, 1863, Coster *v.* Isaacs, 1 *Robertson*, 176.
10. It is not a sufficient ground of demurrer to a complaint for libel that the article complained of does not name the plaintiff. Parker *v.* Raymond, *Ante*, 343.
11. Where the person intended by the libelous matter is not named, or is ambiguously mentioned, the proper facts may be averred and proved, to show that the plaintiff was the person intended. *Ib.*
12. Upon such facts being proved, the question whether the plaintiff was the person intended by the article is a question of fact for the jury. A complaint, in such a case, is sufficient on demurrer, if it contains averments sufficiently certain to enable the jury to determine this question. *Ib.*
13. A complaint in an action to recover back money lost at play by the plaintiff to the defendant, which merely states that the defendant won at gaming of the plaintiff a specified sum, with an averment of demand and indebtedness, and a reference to the statute, does not state facts sufficient to constitute a cause of action. Stannard *v.* Eytinge, *Ante*, 42.
14. Such complaint should aver that the money was lost and was paid or delivered to the defendant, or should otherwise show that the money was actually received by him. *Ib.*
15. In a contract for the sale of the art and mystery of compounding and manufacturing an article of medicine, and the exclusive right to make, use and vend the same, the vendor covenanted not to impart the art to any other person, and not to make or vend the article himself—in consideration whereof the vendee covenanted to pay a certain sum of money, in installments, at specified times.

Held, 1. That the covenants were independent; and that need not allege performance of the contract on his part, in h in an action to recover the money due.

2. That it was not necessary for the vendor to allege that fact such an art or secret as was mentioned in the contract, c in his exclusive possession.

3. That it is sufficient, in such a case, to set forth a copy of under section 152 of the Code, and allege that there is due t the adverse party, a specified sum, which the plaintiff claim *Ct.*, 1865, Hard *v.* Seeley, 47 *Barb.*, 428.

16. In an action by a sheriff, upon an undertaking given to him ant arrested under an order of arrest in a civil action, it is n for the plaintiff to allege in the complaint that the sheriff did the order of arrest and undertaking to the plaintiff's attorney action, as authorized by section 192 of the Code. *N. Y.* 1863, Willet *v.* Lasalle, 1 *Robertson*, 618.

17. Any exoneration of the sheriff from liability, by such deliv omission of the plaintiff to except to the bail, and consequent such bail to the plaintiff in the former action, must be set u fendant affirmatively, as matter of defense, in his answer. *Ib*

18. If a complaint, in an action to recover the possession of re defective in not stating the nature and quality of the estate cla plaintiff, it should be demurred to. After issue has been ta answer, and new matters set up by way of defense, the objec be taken by motion to amend the complaint. *Supreme Ct.*, 18 Crego, 47 *Barb.*, 599.

19. Where a complaint in an action is defective for not stating fa to constitute a cause of action, the defect is not waived by th answering it; but may be objected to upon the trial, notw Stannard *v.* Eytinge, *Ante*, 42.

20. The fact that a complaint states a fact which is not necessa tain the action, does not render it obligatory upon the plainti such fact upon the trial. *Supreme Ct.*, 1866, Denis *v.* Snell, 3 467.

EXTENSION OF TIME.

CONFESSION OF JUDGMENT.

1. A statement in a confession of judgment was as follows: "Th debtedness arose on account for goods, wares and merchandis delivered by said plaintiff to me since the first day of January, for which I have not paid. And I hereby state that the sum me confessed is justly due to the said plaintiff, without any fi ever.—*Held*, sufficient. The Code of Procedure does not r statement to be as special and precise as that under the act of

does it require the statement to contain a minute description of the goods sold, or the time and place, and terms of sale of each particular parcel. *Ct. of Appeals*, 1864, Gandall *v.* Finn, 33 *How. Pr.*, 444.

2. That the supreme court has power to amend a statement and confession of judgment,—see Union Bank *v.* Bush, 36 *N. Y.*, 631.

CONTEMPT.

1. To authorize the punishment of a party for contempt in refusing to be examined under sections 390–393 of the Code, it need not appear that the misconduct was calculated to, or did, defeat, impair, impede, or prejudice the rights or remedies of any party, as required by 2 *Rev. Stat.*, 538, § 20, in ordinary cases of contempt. *N. Y. Superior Ct.*, 1863, Woods *v.* De Figaniere, 1 *Robertson*, 607.
2. To sustain an application for an attachment to punish a judgment debtor for disposing of moneys received by him *after* the service of an injunction order in supplementary proceedings, the creditor must show affirmatively that the money was already earned by or due to the debtor, when the order was served. Gerregani *v.* Wheelright, *Ante*, 264.
3. The authority to punish a counsel for contempt of court pertains solely and exclusively to the court in which it occurs in its immediate view and presence; and the power can no more be delegated to a judge of the appellate court than it could legally be assumed by a judge of some other tribunal. *N. Y. Superior Ct. Sp. T.*, 1864, Heerdt *v.* Wetmore, 2 *Robertson*, 697.
4. A county judge cannot punish for contempt in refusing to obey a subpœna to appear and testify before him, which is issued from the supreme court, and attested in the name of one of its justices. People *ex rel.* Brunett *v.* Dutcher, *Ante*, 151.
5. Nor can he punish for contempt, in refusing to attend pursuant to subpœna issued in his name, whether signed by him or not. *Ib.*
6. In proceedings to enforce the rights of a party who has recovered a judgment in a civil action, by punishing the defendant as for a contempt, for refusing to comply with the judgment, *personal* service of the order to show cause why the defendant should not be punished is not indispensable. The order may be served on his attorney, in the same manner as other orders in the cause. Pitt *v.* Davison, *Ante*, 398.
7. Where such proceedings are commenced by order to show cause, interrogatories are not necessary. *Ib.*
8. When a court of justice has obtained jurisdiction of the person of the defendant in an action, it retains jurisdiction for all purposes of enforcing the judgment, until its requirements are fully complied with; including jurisdiction to punish for contempt in refusing to perform it. *Ib.*

9. The proper mode of proceeding to punish for contempt in re form a judgment,—stated. *Ib.*

CONTRACTS.

1. Where an offer is made by telegraph, acceptance is compl patching a notice that it is accepted, by the telegraph; and th bound by the engagement from that time. *So held*, in a ca parties had previously agreed on the telegraph as a medium communication. Trevor *v.* Wood, *Ante*, 355.
2. The fact that delivery of the message is delayed (without pr party sending the message), and that the party to whom it is the delay telegraphs a revocation, is not enough to exonera the obligation to perform the agreement. *Ib.*
3. An assignment for the benefit of creditors, which directs o such a disposition to be made of property conveyed, or of its will, if carried into effect by the assignee, necessarily depriv or's creditors of their right to have such property applied to t of their claims, is, on its face, fraudulent as against the credit signor. *N. Y. Superior Ct. Sp. T.*, 1865, Lester *v.* Pollock, 691.
4. Where parties, while in possession of premises under a cont chase, and a deed of the same, purchase overdue and unpai of the vendors on the premises, they become, by such purch tuted in place of the mortgagees, and are entitled by subrog the rights of mortgagees in possession. *N. Y. Superior Ct. S* Madison Avenue Baptist Church *v.* Baptist Church in Olive *Robertson*, 642.
5. When a stockbroker purchases stock for a customer, on an un that the customer is to keep up a certain margin, and that whi good the broker will hold the stock for him, the customer does absence of an agreement to that effect, acquire a right to n the stock can be sold for a failure on his part to keep good t Markham *v.* Jaudon, *Ante*, 286.
6. The relation of pledgor and pledgee, and the implied right o to notice of time and place of sale of the pledge, do not ari case. *Ib.*
7. A contract for the sale of goods, deliverable at a future day, er's option, is not within the statute of betting and gaming (1 662), or void at common law, as being against public policy. *perior Ct.*, 1864, McIlvaine *v.* Egerton, 2 *Robertson*, 422.

CONVICTION.

1. It is no longer necessary, in order to sustain a commitment upon a conviction in a court of special sessions in the city of New York, that the record of the conviction should be filed in the county clerk's office. Matter of Williamson, *Ante*, 244.
2. It is not error for which a criminal conviction will be reversed, that the judge who tried the cause denied a motion to strike out evidence which was wholly immaterial. McKee *v.* The People, *Ante*, 216.

CORPORATIONS.

1. A corporation was required by its charter (in addition to the general provisions of the Revised Statutes upon the same subject) to cause a book to be kept containing the names and residences of all the stockholders, the number of shares held by them respectively, &c., which book, the charter directed, should at all reasonable times be open for the inspection of the creditors and stockholders of the corporation. The corporation kept no book precisely answering to the requirement of the charter. It kept, however, a transfer book, a register of certificates of stock, and a stock ledger. On application by a stockholder for an opportunity to inspect the book prescribed by the charter to be kept, the officers of the corporation offered an inspection of the transfer book and register, but refused to permit the stock ledger to be examined.

   Held, 1. That the stockholder was entitled to an inspection of the stock ledger,—that being, of all the books kept by the company, the one which most nearly fulfilled the requisites of the charter provision. The circumstance that it contained more facts than the charter required to be stated, formed no excuse for refusing to furnish it, so long as the company neglected to keep the book required.

   2. That the stockholder's right to have an inspection of the stock ledger might be enforced by mandamus. People *ex rel.* Richmond *v.* Pacific Mail Steamship Co., *Ante*, 364.
2. Where the answer in an action brought against the Merchants' Union Express Co. to enforce a dissolution, alleged that the nominal plaintiff was not the real party in the suit, but that the suit was prosecuted wholly at the instigation and in the interest of rival companies, and this allegation was not denied in the affidavit read by the plaintiff on a motion for the appointment of a receiver,—*Held*, that the allegation must be taken as true for the purposes of the motion—and that, taking it to be true, it was fatal to the suit. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose of dissolving or restraining an asso-

ciation or company of which the nominal plaintiff may b
Waterbury *v.* Merchant's Union Express Co., *Ante*, 163.

3. *It seems*, that our courts will not presume that the executiv
a foreign government has power, without some legislative or
tion or approval, to annul or dissolve a corporation. Lea *v.* .
lantic & Pacific Canal Co., *Ante*, 1.

4. The rules of the common law relative to the dissolution of
and the distinction between the dissolution of a corporation
pension of its franchises, and between the original charter an
of revival,—considered. *Ib.*

5. A decree by which an act of incorporation is annulled, and the
dissolved, "*except* for certain purposes," and which declares
poration shall only continue in existence for purposes specifi
persons shall be appointed as receivers to take its assets and
business, does not operate to extinguish the existence of the
in any such sense that it cannot be revived by repeal of the d
other governmental act recognizing the corporation as existen

6. Where, by a decree such as above described, a corporation w
and a subsequent decree of government contained a complete
of the corporation as existing, and by a new name;—*Held*, th
decree should be considered as reviving the corporation, un
charter, and subject, though under a new name, to its debts an
incurred under the old name. *Ib.*

7. Even if the second decree should be called a new charter, it o
be regarded as creating a new corporation, but as reviving and
and somewhat modifying the old one—at least as to foreign c
the old one. *Ib.*

8. Proceedings for the consolidation of several manufacturing
into one,—authorized. 2 *Laws of* 1867, 2444, ch. 960.

9. *Receivers and trustees* of insurance companies required to mal
annual and other statements of assets, liabilities, income and ex
in the same manner and form, and under the same penalties as
of such companies are now required by law to make annual
statements to the insurance department. *Laws of* 1865, 329, c
as amended* 2 *Laws of* 1867, 1786, ch. 709, § 1.

10. Foreign insurance companies. How they are to make and
statements. 2 *Laws of* 1867, 1786, ch. 709, § 2.

11. Mining companies authorized to take mining lands, in cer
without consent of owner, on their filing with the commission
land office a full description of the location of such lands, and
grant thereof from said commissioners, who are hereby aut
make such grant, and file the terms thereof. 2 *Laws of* 1867, c

12. The said company entitled to work such mines may file a pet
supreme court of the State, setting forth the facts upon which
such right and the reasons which prevent them entering upo

* The amendment consists, substantially, in the addition of th
italics.

necessary for their mining operations, and upon such petition the court may appoint three disinterested persons as commissioners to examine into the matter, ascertain and fix the damages aforesaid, and report to the court. *Id.*, § 2.

13. Notice of the filing of such petition shall be published in one of the papers printed in the county, or in each of the counties where the mine or mines are situated, and in the State paper, and a copy of such notice shall be served personally upon the owners of the land, or, if they are infants, upon their guardians, or if lunatics, or under any other legal disability, on the committee having charge of them and their property. And the publication of such notice in the State paper shall be deemed a sufficient notice to such owners as are residents in other States or in other countries, or are temporarily absent from the State, provided that when the actual residence of such absentees is known or can be ascertained, a copy of such notice and petition shall be sent them by mail. *Ib.*

14. All the parties interested shall be entitled to a hearing before such commissioners, at such time or times as said commissioners shall appoint. *Ib.*

15. The report of the commissioners shall state:

1. The existence of the mine or mines proposed to be worked.

2. The names of the parties owning the land in which the mine or mines are situated, and the owners of the adjacent lands, so far as they are affected by the application, and the nature and value of their interest in the same individually. A map of such lands, from actual survey by metes and bounds, shall accompany the report.

3. An estimate of the damages to such owners from the contemplated use and occupation of their lands.

4. Such other information as the court may direct. *Ib.*

16. The report of the commissioners shall be made within a reasonable time, to be fixed by the court. *Id.*, § 3.

17. An order shall be made, in the discretion of the court, either denying the petition, or granting it, and determining the quantity of land necessary for working the mine or mines, the damages to property by taking possession thereof, and the annual rent or compensation to be paid to the owner, lessee or occupant thereof, so long as the use and occupation shall continue. *Ib.*

18. And thereupon the company in whose favor the order shall be made, upon payment of the damages, and upon entering into an agreement, to be approved by the court, to pay the annual rent, or the compensation and damages thus determined, shall have the right to enter upon and occupy and use the land set apart by such order, so long as they or their assignees shall work the said mine or mines and shall pay the annual rent or compensation. *Ib.*

19. If the parties owning the land are infants or otherwise incompetent to act, the court shall appoint guardians to take care of their interests, and shall direct how any damages assessed, or compensation or rents to become due, shall be paid and invested for their benefit. *Id.*, § 4.

20. The Open Board of Brokers in the City of New York is not a corporation; nor is it a joint stock association; nor is it, as respects questions relating to the continuance or termination of membership in it, a partnership. White *v.* Brownell, *Ante*, 318.

21. That board is a voluntary association of persons who, for convenience, have associated to provide, at the common expense, a common place for the transaction of their individual business as brokers. *Ib.*

22. National banks, organized and doing business under the a are to be regarded as *foreign* corporations within the pro Code of Procedure, authorizing actions to be brought and s be issued against corporations "created by or under the law State, government or country." These terms are intended corporations formed under the laws of any other government enacting the law, even though that government should not b ment of another State or country, which plainly includes th of the United States. And the words "foreign corporation used in sections 229 to 239 were intended to include and rel porations comprehended within the general language of sec to be equally extended in their legal import; and, as so und include corporations formed under the laws of the United St is a government other and different from the one speaking law under consideration. *So held*, where the bank was o located within this State. *Supreme Ct.*, 1867, Bowen *v.* F Bank of Medina, 34 *How. Pr.*, 408.
23. A national bank is a "foreign corporation," within the mea term as defined in section 227 of the Code of Procedure; and in this State is liable to be attached in an action against it, extent as that of foreign corporations generally. *So held*, wh was organized and located in another State. Cooke *v.* St Bank of Boston, *Ante*, 339.
24. The Code of Procedure does not authorize the issuing of a as a provisional remedy against a *domestic* corporation. Fer ican Glass Silvering Co., *Ante*, 419.

COMPLAINT, 4; JOINT STOCK ASSOCIATIONS; JURISDICTIO

COSTS.

1. The costs of an action are to be taxed according to the fee bi at the time of the verdict, notwithstanding proceedings thereo *N. Y. Superior Ct.*, 1864, Scudder *v.* Gori, 3 *Robertson*, 629.
2. In cases of an equitable nature,—*e. g.*, an injunction suit,—it ary with the court in which the action is brought, to grant or The amendments to the Code of Procedure passed in 1862 d this rule. Staiger *v.* Schultz, *Ante*, 377.
3. An order of such court, directing that the plaintiff may dis action without costs, is not reviewable in the court of appeals
4. In a suit brought against the members of the Metropolita Health to restrain them from an official act, the defendants a their defenses, and appear by two attorneys, so as to authori ance of two bills of costs. *Supreme Ct. Sp. T.*, 1867, Stewa 33 *How. Pr.*, 3; affirmed on other grounds, *Ante*, 383; *N. Y.* 1867, Cooper *v.* Schultz, 33 *How. Pr.*, 5.

5. On a motion at special term for a new trial on a case, costs are to be granted as on an appeal from a judgment. *N. Y. Superior Ct.*, 1864, Scudder *v.* Gori, 3 *Robertson*, 629.
6. Motions for extra allowance, under section 309 of the Code of Procedure must be made upon papers. Gori *v.* Smith, *Ante*, 51.
7. Such a motion is addressed to the *court*, and is not dependent upon the recollection or discretion of the particular judge, as an individual. *Ib.*
8. Since the decision of the court of appeals, Dec., 1855, in People *v.* New York Central R. R. (30 *How. Pr.*, 148),—that orders for extra allowances under section 309 are appealable,—it is necessary that the facts upon which motions for such allowances are made should be presented in such a mode as to have them passed upon on appeal. *Ib.*
9. An extra allowance of costs may now be granted on an appeal from a surrogate's court, under section 309 of the Code of Procedure. Such an appeal is, for all purposes of costs, an action at issue on a question of law; and its determination constitutes a trial within the meaning of the section. Seguine *v.* Seguine, *Ante*, 442.
10. The provisions of 2 *Rev. Stat.*, 619, § 24, subd. 1,—giving increased costs to public officers,—do not apply to an *injunction suit* brought to restrain a public officer from doing a threatened act, injurious to the plaintiff. Stewart *v.* Schultz, *Ante*, 383.
11. Under the statute allowing double costs to public officers sued for official acts, the clerk is not to decide whether they are to be allowed. The party must apply to the court for them. *Supreme Ct. Sp. T.*, 1867, Stewart *v.* Schultz, 33 *How. Pr.*, 3; affirmed on other grounds, *Ante*, 383.
12. In an action in which double costs are given by statute, it is not necessary to award them in a judgment by the court of appeals, affirming a judgment of the court below, in order to entitle the successful party to them on appeal. The officer who adjusts the costs is bound to tax such costs as double; and the court below may either order him to do so, or on appeal, correct his adjustment of them in that respect. *N. Y. Superior Ct. Sp. T.*, 1865, Carpentier *v.* Willet, 3 *Robertson*, 700.
13. The death of a party entitled to double costs in an action, and the substitution of his representative as a party in his place, does not change the right to double costs, and the representative of a party to an action who dies while an appeal is pending in the court of appeals is entitled to continuous term fees after the death of such party, if the action and appeal are subsequently revived in his name. *Ib.*
14. An appeal from a judgment which has been settled, and of which satisfaction has been acknowledged, will not be heard by the court merely to protect the right of the respondent's attorney to costs. If the settlement of the judgment be a fraud on his rights, his remedy is by motion to vacate the entry of satisfaction [18 N. Y., 368], or for an order that the defendant pay his costs. [1 Am. Law Reg. N. S., 410–16.] *N. Y. Superior Ct.*, 1863, Cook *v.* Palmer, 1 *Robertson*, 658.
15. Where a judgment is given for a fixed sum for the plaintiff without costs,

and for a like sum for the defendant for costs,—the two ju set each other,—an appeal lies. *Supreme Ct.*, 1866, How 47 *Barb.*, 653; S. C., 32 *How. Pr.*, 300.

16. An appeal does not lie to the court of appeals from an or eral term affirming an order of the special term denying a tax the costs and correct the judgment roll in respect th Sanborn, *Ante*, 189.

17. But upon an appeal from the *judgment*, the propriety of t as the question of legal right to costs is involved, is revi question of the propriety of making a formal correction in question of practice in the court below, and cannot be rais of appeals. *Ib.*

18. Where an order is granted upon condition of the paymen cepting the costs under the order is a waiver of any right it. *N. Y. Superior Ct.*, 1863, Lupton *v.* Jewett, 1 *Robertso*

19. Upon an appeal from a judgment of a county court to court, the successful party is entitled to the full costs given 5 of section 307 of the Code of Procedure. Gray *v.* Hannal

20. The right to those costs being given by statute, any pro order of the supreme court determining the appeal, whic limit the costs to a less sum,—*e. g.*, a provision awarding only,—is a nullity. *Ib.*

21. Entering an order containing such a provision is not a statutory costs. *Ib.*

22. On entering judgment of the general term affirming a jud special term, costs of the appeal only should be entered. It to include in the judgment the cost of the action already in judgment affirmed. [6 How. Pr., 462; 1 Abb. Pr., 130; 15 I *of Appeals*, 1867, Beardsley Scythe Co. *v.* Foste[illegible], 36 *N. Y.*, *How. Pr.*, 97.

23. But if the costs awarded at special term are improperly em record of the judgment of affirmance by the general term mode of correcting the error is by motion in the court below is not one for which the judgment of the general term can b the court of appeals. *Ib.*

24. It is not proper for the court below, on the return of the r the court of appeals, to add any new and independent dire judgment of that court, beyond what is required to carry t into effect; not even a provision for costs of the appeal. C 1864, McGregor *v.* Buell, 33 *How. Pr.*, 450.

25. No appeal can be brought to the court of appeals until the by its judgment, has finally disposed of the whole matter bef ing the right to costs, as well as other rights of the parties. ment of the court of appeals fails to determine any part of t the appeal, the defect cannot be supplied by the court below.

INJUNCTION, 8; JUDGMENT, 5, 9; JUSTICE'S COURT, 5; SECURIT

COUNTER-CLAIM.

1. A counter-claim, or defense of an equitable nature, may be interposed, although the claim or demand mentioned in the complaint is purely of a common law nature, or for the recovery of money only. If the claim and counter-claim arose out of the same transaction or contract there is no necessity for a cross action by the defendant. *Supreme Ct.*, 1867, Hicksville & Cold Spring Branch R. R. Co. *v.* Long Island R. R. Co., 48 *Barb.*, 355.
2. The Code does not allow breaches of contract with other parties to be set up as a defense in an action by way of counter-claim. The statute of set-offs (2 Rev. Stat., 362) is retained for that purpose. *N. Y. Superior Ct.*, 1864, McIlvaine *v.* Egerton, 2 *Robertson*, 422.
3. In an action for a divorce on the ground of cruelty, the defendant can not set up the adultery of the plaintiff as a defense or counter-claim. *N. Y. Superior Ct. Sp. T.*, 1864, Henry *v.* Henry, 3 *Robertson*, 614.
4. In an action by a tenant to annul a lease, upon the ground that fraud was practiced in procuring him to take it, the landlord may set up a counter-claim for rent which has accrued under the lease. Wood *v.* Mayor, &c. of New York, *Ante*, 467.
5. In an action for rent, the defendant may, under a covenant to keep the premises in repair, set up as a counter-claim an amount expended by him in the necessary repair of the premises, and also damages sustained by the loss of the use of certain parts of the premises rendered untenantable for want of repair. And he may recover for his actual expenses in repairs, although they exceeded what they would have cost the landlord, had he employed his own mechanics. The landlord's omission to repair gave the tenant the right to make repairs by his mechanics, and with such suitable materials as he should select. He was bound to be reasonable and judicious in his repairs; but he was not compelled to select precisely the same kind of paper and paint, or to be precise that the expense was not a farthing greater than had before been expended upon the same spot. He was at liberty to repair according to the modern style, and adopt modern improvements. *Ct. of Appeals*, 1866, Myers *v.* Burns, 35 *N. Y.*, 269.
6. The right to recover for money lost in betting, is a demand arising on contract, and may be set up as a counter-claim under subdivision 2 of section 150 of the Code. *Supreme Ct.*, 1867, McDougall *v.* Walling, 48 *Barb.*, 364.

SET-OFF.

COVENANT.

1. A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected

on such lots shall be set back a specified distance from the line of the street on which the lots front,—is a covenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of and against any subsequent grantee of either lot. Roberts *v.* Levy, *Ante*, 311.

2. A subsequent purchaser of a lot subject to such a covenant may be restrained from building in violation of the covenant. *Ib.*
3. Such a covenant constitutes an "incumbrance" on the lot to which it applies; and if the covenantor subsequently conveys by a deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed. *Ib.*
4. The fact that a covenant constituting an incumbrance was upon record, whereby one who bought the land under a subsequent deed containing a covenant against incumbrances had *constructive* notice of it, does not affect his right to recover damages for the breach of the latter covenant. *Ib.*
5. But if such purchaser had *actual* notice of the incumbrance at the time when he accepted the deed, *it seems*, that this fact may be proved in mitigation of damages. *Ib.*

CREDITOR'S ACTION.

1. A creditor who has exhausted his remedies at law can attack the validity of an assignment on the ground of fraud, and reach, by a judgment avoiding the assignment, any property remaining in the hands of the assignees, or which was subject to their control. *N. Y. Superior Ct.*, 1865, Lawrence *v.* Bankof the Republic, 3 *Robertson*, 142; and see 35 *N. Y.*, 320, 322.
2. The sixty days allowed by statute to the sheriff to execute and return the process of execution is for the benefit of the sheriff, to prevent compulsory proceedings, &c., against him, until he has had a reasonable time to execute such process. In a proper case, a creditor's bill can be maintained, where the action is commenced after a return in good faith of *nulla bona*, though it be made within the sixty days allowed by law as the possible life of an execution. *Ct. of Appeals*, 1866, Renaud *v.* O'Brien, 35 *N. Y.*, 99.
3. A sheriff cannot institute a creditor's suit to reach the proceeds of the assigned property, that they may be applied on an execution in his hands. *Ct. of Appeals*, 1866, Lawrence *v.* Bank of the Republic, 35 *N. Y.*, 320; reversing S. C., 3 *Robertson*, 142.
4. In a creditor's action brought against husband and wife to enforce a judgment against the husband out of real property held in the wife's name, it appeared that the real property was bought from the plaintiff himself, with money which the husband gave to the wife in good faith, at a time when he was free from debt; and also that the debt on which the judgment was recovered was incurred by the husband to the plaintiff, and the conveyance made by the plaintiff to the wife simultaneously and with a full

DEFINITIONS.

1. The legal definitions of "inn," "hotel," and "boarding-house,"—compared. Cromwell *v.* Stephens, *Ante*, 26.
2. The plaintiff occupied, in the city of New York, a building which was a large structure of eight stories, each story consisting of lodging rooms adapted to the use of one person only. Above the basement it was used exclusively as a lodging house. The rooms were small, viz., from four to six feet wide and eight feet long, and were let to lodgers at a fixed rate per night. There were no arrangements for boarding or cooking for guests, the house above the basement being adapted only for lodgings, nor was there any bar or restaurant belonging to or connected with the plaintiff's occupation of the building. The Croton water was partially supplied throughout the building, but during half of the day it did not usually rise above the basement, in consequence of deficiency of the supply.—*Held*, that this structure was not chargeable as a "hotel" with the Croton water tax payable by *hotels*. *Ib.*
3. *It seems*, that such a building is a "hotel," in the legal sense of that term as ordinarily employed. *Ib.*

DEMURRER.

In an action against one of two obligors or contractors, upon a joint obligation or contract, the complaint is demurrable for defect of parties. *Supreme Ct. Sp. T.*, 1867, Eaton *v.* Balcom, 33 *How. Pr.*, 80.

COMPLAINT.

DEPOSITIONS.

1. History and objects of the statute authorizing the compulsory examination of a witness whose testimony is required for the purposes of a motion, —stated. Brooks *v.* Schultz, *Ante*, 124.
2. Where the deposition of a witness is taken under an order pursuant to the statute, for his examination before a referee, the adverse party is entitled to notice of the examination, and may attend and cross-examine. *Ib.*
3. It is not irregular for a referee to whom it is referred to take the testimony of a witness, to put questions in the course of the examination—no unfairness or intent to favor either party at the expense of the other being shown. *Ib.*

DISCOVERY AND INSPECTION.

1. On an application for a discovery of books and papers, substitute his own judgment, on vague information, the na of which is not disclosed, for that of the court. Enough i to enable the court to decide that the discovery is necessa *perior Ct. Sp. T.*, 1865, Kaupe *v.* Isdell, 3 *Robertson*, 699.
2. Where there is no sufficient information before the court of writings to enable it to judge whether they would be b judicial to either party as evidence, it ought not to compe tion. *N. Y. Superior Ct.*, 1865, Strong *v.* Strong, 3 *Rober*
3. An application for the discovery of books and papers can where the entries sought for are not shown to be evidenc contain information by means of which evidence can be ob *Superior Ct.*, 1863, Woods *v.* De Figaniere, 1 *Robertson*, 6
4. On an application for the discovery of books and papers, t defendant of all possession or control of the writings sough answer, notwithstanding he has omitted to controvert an he has delivered such documents to his counsel. *Ib.*
5. An order of discovery is confined to an examination of ad witnesses, and the production of books, papers, documents a is not applicable to a compulsory inspection of articles which form the subject-matter of an action, by third parti enable them to qualify themselves to testify as experts, on the mere quality of such articles. *N. Y. Superior Ct.*, 1 Tuska, 1 *Robertson*, 663.

DISMISSAL OF COMPLAINT.

1. Although an admission made by the plaintiff's counsel i which is fatal to his case, may entitle the defendant to a missing the complaint, yet the motion for dismissal will n merely on the ground that the counsel has not stated in hi cient facts to constitute a cause of action. *N. Y. Superi* 1865, Stewart *v.* Hamilton, 3 *Robertson*, 672.
2. If no sufficient evidence to sustain a verdict in favor of given, it is the duty of the court to take the case from the miss the complaint. *N. Y. Superior Ct.*, 1865, Meyer *v.* I *son*, 172.
3. Where the case turns wholly upon the question as to whic tracting parties first broke and rescinded the contract, and on this point is conflicting, the question is one for the jur and the court cannot properly nonsuit the plaintiff. *Supr* Monroe *v.* Reynolds, 47 *Barb.*, 574.

4. In ordinary actions for damages for negligence, the question whether the plaintiff was free from negligence is a question of fact, to be determined by the jury, under appropriate instructions, and subject to the revisory power of the courts. It is only where the proof of misconduct on the part of the plaintiff is clear and decisive that the court is authorized to grant a nonsuit. Ernst *v.* Hudson River R. R. Co., *Ante*, 82.
5. In an action against a railroad company for damages sustained by collision with a vehicle at a railroad crossing, it appeared that on the occasion of the accident the signals usually given by the company's agents of the approach of a train were omitted, and that the injured person approached and attempted to cross the track without knowledge that a train was approaching.—*Held*, that it was error to nonsuit the plaintiff. The question whether the omission of the signals was not negligence, and whether the plaintiff took reasonable precautions under the circumstances, ought to have been submitted to the jury. *Ib.*
6. In determining the propriety of a nonsuit, the appellate court should assume the truth of the facts which the testimony offered on behalf of the plaintiff legitimately conduces to prove, notwithstanding their truth is controverted by the defendant's witnesses. *Ib.*
7. In an action by an administrator to recover damages for causing the death of his intestate, if it appears from the plaintiff's evidence that the negligence or wrongful act of the deceased contributed to cause his death, the defendant is entitled to have the complaint dismissed. Per Bockes, J. Curran *v.* Warren Chemical & Manufg. Co., *Ante*, 240.

DISTRICT COURTS (of the City of New York).

Execution upon a judgment of a district court of the city of New York, which has been docketed in the New York common pleas, may be issued by the attorney of the judgment creditor. It is not required to be issued by the clerk. Brush *v.* Lee, *Ante*, 204.

DIVORCE.

1. An act of condonation, to be effectual, must be one in which both husband and wife assent, and in which each participates. An unaccepted offer to return to the matrimonial bed is not, of itself, a condonation, but only an expression of a willingness to condone. *N. Y. Superior Ct.*, 1864, Betz *v.* Betz, 2 *Robertson*, 694.
2. In an action for divorce, an order will not be granted referring the action to a referee "to *try and determine* the issues therein," though the attorneys for the respective parties sign a stipulation consenting to such order. The court is not at liberty to divest itself of its obligation of the guardian of the rights of married women so far as to delegate the power to hear

and determine the issues, upon a careful consideration of th others. *N. Y. Superior Ct. Sp. T.*, 1864, Simmons *v.* Simm *son*, 642.

3. A complaint, filed to procure a marriage declared void, char defendant married plaintiff, she had a husband living; that sl to the plaintiff that she had procured a divorce from such fo but that the divorce was void for fraud and collusion practi ing it.—*Held*, that the complaint was insufficient to warrant the parties to the former marriage colluded to procure the d binding upon each of them; neither could impeach it; ar marriage was valid as against them both, and consequently t plaintiff. Kinnier *v.* Kinnier, *Ante*, 425.

ALIMONY; COUNTER-CLAIM, 3; ISSUES, 1; NEW TRIAL

ELECTIONS.

1. A sale in foreclosure is not void because it was made on King *v.* Platt, *Ante*, 434.
2. Where a summons in an action in a justice's court is retur day of a general election, and there is no appearance, the ju no jurisdiction—not even to adjourn the proceedings to People *ex rel.* Monday *v.* Schwartz, *Ante*, 395.
3. A judgment entered on such adjourned day may be revers *rari*. *Ib.*

EVIDENCE.

1. Courts are not at liberty to indulge in any presumption as legislation of another State or country has been, or what sta have enacted. They will not presume that the statute law State is the same as that of their own. Where there is no ev contrary, it will be presumed that the common law is in force the other States (except possibly Louisiana). If it has bee changed or modified by statute in another State, that fact mu either in the way provided by the acts of Congress or by th in section 246 of the Code. *Supreme Ct.*, 1867, White *v Barb.*, 549.
2. There is no presumption of law that the owner of premises u death by accident occurs, is chargeable with fault or negligen to the cause of death, or with liability therefor. To cha damages, circumstances under which the injury occurred mu showing some wrongful act or omission on his part. Curra Chemical & Manufg. Co., *Ante*, 240.
3. Upon the question "what the contract really was," evide

thing that took place between the parties, upon the subject, before its final completion, is proper, — especially where it was altogether verbal. *Supreme Ct.*, 1866, Pierson *v.* Hoag, 47 *Barb.*, 243.

4. Parol evidence is not admissible to vary, enlarge, or contradict a written stipulation, made by an indorser of a promissory note, waiving "notice of protest." The rule excluding parol evidence to enlarge or contradict a writing is not limited to contracts made upon a consideration passing between the parties, but is equally applicable to all cases where the writing was designed to be the repository and evidence of the final conclusions of the parties. *Supreme Ct.*, 1867, Buckley *v.* Bentley, 48 *Barb.*, 283.
5. The admissions of one partner, whether sworn to or otherwise, in regard to partnership matters, are always proper to charge his copartners; and it is immaterial whether they appear in a sworn statement, or were orally given, or were testified to by such partner when under examination as a witness. To render the admission competent, however, it must appear by other evidence that a copartnership existed at the time to which the admission refers, or to which it is supposed to relate. *N. Y. Superior Ct.*, 1864, Fogerty *v.* Jordan, 2 *Robertson*, 319.
6. An admission, in the answer, of the employment of the defendants by plaintiff, "under the firm name of A., B. & C.," is conclusive evidence, if not of a partnership between the defendants, at least of such *joint* employment of them, and of their joint liability to the plaintiff, as would make an admission by one binding on the others. *Ib.*
7. Declarations of defendants who do not answer the complaint, and were not served with the summons in the action, which declarations tend to establish the allegations of the complaint, and were made when the defendant who defends was not present, are not admissible in evidence against the latter, where they did not accompany acts, and are not a part of the *res gestæ*. *Supreme Ct.*, 1866, Peck *v.* Yorks, 47 *Barb.*, 131.
8. Declarations of the assignor of a judgment, made after the execution of the assignment, are not competent evidence against a defendant in the judgment. *Ib.*
9. Before the declarations of one conspirator can be given in evidence against another, for any purpose, a fraudulent combination or conspiracy must be established. *Ib.*
10. Upon a trial for murder, conversations had in the presence and hearing of the prisoner, at the time of the homicide, and tending to explain the prisoner's state of mind, may be given in evidence as part of the *res gestæ*. McKee *v.* People, *Ante*, 216.
11. The usage of a firm in their general business—*Held*, not admissible to be proved to contradict the testimony relative to a particular transaction. Lane *v.* Bailey, 47 *Barb.*, 395.
12. The transcript of a docket of a judgment recovered in one of the district courts of the city of New York, in order to be admissible in evidence to prove the judgment in support of an execution thereon, need not state that a transcript of such judgment was given for filing in the county clerk's

office. The actual filing of a transcript prior to issuing execution may be established by other testimony. *N. Y. Superior Ct.*, 1863, Carpenter *v.* Simmons, 1 *Robertson*, 360.

13. Although the docket and a transcript are made evidence, there is nothing in the statute making them the *only* evidence. Other competent evidence may still be employed to prove the judgment. *Ib.*

14. Under an order authorizing the reading of a party's testimony as taken on a former trial,—*Held*, that the testimony could not be read from the printed minutes without proof that the paper from which it was read contains a correct and true minute of the testimony. *N. Y. Superior Ct.*, 1864, Oakley *v.* Sears, 2 *Robertson*, 440.

15. An instrument defectively stamped, without any intent to evade the provisions of the revenue law, may be read in evidence upon proof of those facts, accompanied by a distinct offer to comply with the provisions of that act, and an actual compliance therewith. *Supreme Ct.*, 1866, Beebe *v.* Hutton, 47 *Barb.*, 187.

16. A plea in abatement, in an action on contract, that *A. and B.* were copartners with the defendant, and should have been joined as co-defendants, is not sustained by evidence as to *A. only* that *he* was such a party. The defendant, by his plea, must give the party "a better writ;" that is, he must state precisely and truly who were the parties to the contract; and if he fails to do this his plea fails also. To sustain the plea, it must appear that there is neither a greater nor less number of parties than is set up in the plea. [2 Hill, 200.] *Ct. of Appeals*, 1863, Wigand *v.* Sichel, 33 *How. Pr.*, 174.

17. In an action, not for deceit in the sale of a horse, but for what was formerly called a false warranty, it is unnecessary to prove the *scienter* on the part of the seller. Proof of the warranty is sufficient. As such an action sounds in contract, and not in tort, whether the defendant knew that the warranty was false at the time of making it, is of no importance. *Supreme Ct.*, 1867, Ross *v.* Mather, 47 *Barb.*, 582.

18. The issuing and return of an execution is sufficiently proved by the sheriff's indorsement of date of filing and return, and the testimony of a witness that he had seen it on file in the clerk's office. *N. Y. Superior Ct.*, 1863, Meyer *v.* Mohr, 1 *Robertson*, 333.

19. The rule for determining what is sufficient evidence of premeditation to convict for murder,—stated. McKee *v.* People, *Ante*, 216.

AFFIDAVIT; DEPOSITIONS; DISCOVERY AND INSPECTION; DISMISSAL OF COMPLAINT; MALICIOUS PROSECUTION; WITNESS.

EXCEPTIONS (BILL OF).

1. An expression of opinion, by the presiding judge, upon the weight or bearing of the evidence submitted to the jury, is not matter of exception. McKee *v.* People, *Ante*, 216.

2. On an appeal from an order refusing a new trial, applied for upon a case, as well as upon exceptions, if it appears that an expression of opinion upon a question of facts, by the judge in his charge to the jury, probably misled them, to the appellant's injury, a new trial will be granted. Markham *v.* Jaudon, *Ante*, 286.
3. When, upon trial of a cause at circuit and before a jury, the court, on motion of defendant when the plaintiff rests, dismisses the complaint, and the plaintiff excepts, it is competent for the judge to order the exception to be heard in the first instance at general term. Lake *v.* Artisans' Bank, *Ante*, 209.
4. Where, on an appeal founded on such exception, it clearly appeared that the court had decided the question upon a wrong issue, and had omitted to notice a fact material to the plaintiff's case,—*Held*, that the exception ought to be regarded as sufficient to warrant the appellate court in reviewing the decision. *Ib.*

TRIAL.

EXECUTION.

1. Under section 289 of the Code,—which presents the requisites of an execution,—neither the *teste* nor the direction to return is a necessary part of it. Therefore, any errors in them are immaterial. *N. Y. Superior Ct.*, 1863, Carpenter *v.* Simmons, 1 *Robertson*, 360.
2. The delivery of an execution to the sheriff binds the personal property of the defendant, and authorizes a sale thereof after the death of such defendant, although there was no actual levy previous to his death; provided the property is not exempt from levy and sale. *Supreme Ct. Sp. T.*, 1866, Becker *v.* Becker, 47 *Barb.*, 497.
3. No application to the court for leave to issue execution on a judgment rendered there is necessary, until the lapse of five years from the entry of the judgment. And after the expiration of such five years, leave is unnecessary when execution has been issued on the judgment within five years, and returned unsatisfied in whole or in part. *Supreme Ct.*, 1867, Wilgus *v.* Bloodgood, 33 *How. Pr.*, 289.
4. Property which is exempt from seizure and sale upon execution in the lifetime of the judgment debtor, continues thus exempt after his death, for the benefit of his widow, if she continues to reside in the house occupied by her husband in his lifetime, with her minor children for whom she provides. *Supreme Ct.*, 1866, Becker *v.* Becker, 47 *Barb.*, 497.
5. "No property now exempt by law shall be exempt from levy or sale, under an execution, issued upon a judgment obtained in any court in the city of New York, for work, labor or services done or performed by any female employee, when such amount does not exceed the sum of $15, exclusive of costs." 2 *Laws of* 1867, 1399, ch. 516, § 1.
6. "Whenever any execution issued upon a judgment as aforesaid, shall be

returned unsatisfied, the clerk of the court wherein such j obtained, shall issue a further execution to any marshal of t York, commanding him to collect the amount due upon suc in default of payment thereof, to arrest the defendant in su and him safely convey to the jail or debtor's prison of the c York, and commanding the jailor of said jail to keep the s without benefit of jail limits until the said defendant shall judgment, or be discharged according to law; but such impr in no case extend beyond the period of five days." *Id.*, § 2

7. It is not necessary, to sustain an execution against the per liability of the defendant to arrest should appear by the judg is a provisional remedy; and when the facts which authorize sic to the cause of action, they may be shown by proof o judgment record. Lovee *v.* Carpenter, *Ante*, 309.
8. In an action to recover possession of real estate, and dam holding such possession, upon the failure of the plaintiff to re ecution for costs cannot issue against the body of the plai *Appeals*, 1866, Merritt *v.* Carpenter, 33 *How. Pr.*, 428.
9. A person charged in execution, though allowed to go upon t prisoner, within the statute authorizing prisoners to apply fo *N. Y. Superior Ct.*, 1863, Coman *v.* Storm, 1 *Robertson*, 705.

CAUSE OF ACTION, 6, 7; DISTRICT COURT.

EXECUTORS AND ADMINISTRATORS.

1. "Any surrogate may, in his discretion, refuse the applicatio testamentary, or letters of administration, of any person u and write the English language." *Laws of* 1867, 1927, ch. 7
2. "Administration in case of intestacy shall be granted to the the deceased, who would be entitled to succeed to his perso they or any of them will accept the same, in the following o his widow. 2. To his children. 3. To the father. 4. To 5. To the brothers. 6. To the sisters. 7. To the grandchil any other next of kin who would be entitled to share in the of the estate. If any of the persons so entitled be minors, a shall be granted to their guardians. If none of the said relat dians will accept the same, then to the creditors of the decea creditor first applying, if otherwise competent, shall be entitl ference. If no creditor apply, then to any other person or pe competent; but in the city of New York the public admin have preference, after the next of kin, over creditors and all o and in other counties of this State the county treasurer shall ence, next after creditors, over all other persons; and in case woman dying intestate, her husband shall be entitled to admi preference to any other person, as hereafter provided." 2 *R* § 27, as amended 2 *Laws of* 1867, 1927, ch. 782, § 6.
3. Sections 8 and 10 of the "Act of 1864 in relation to special a or collectors" (Laws of 1864, 109, ch. 71), repealed; but no let

tions shall be issued to any person incompetent to act as such executor. 2 *Laws of* 1867, ch. 782, § 7.

4. "Whenever any executor, administrator or guardian shall have been compelled by summons, order or citation, issued by a surrogate, to render and file an inventory and appraisal, or an account of the property and estate in his hands, the costs of such compulsory proceeding may, in the discretion of the surrogate, be charged upon such executor, administrator or guardian, personally." *Id.*, § 8.

5. Executor or administrator, after the expiration of one year from appointment, may render final account, pursuant to Revised Statutes, and same proceedings and decree may be had thereon as though the account had been rendered at the expiration of eighteen months from the grant of letters. *Id.*, § 14.

6. One who, in the capacity of administrator, commences an action for the benefit of the estate, does not become personally liable for costs, by the fact that before judgment he is removed from the administration. Baxter *v.* Davis, *Ante*, 249.

7. Where executors bring an action to close up the estate, against surviving partners of the testator, and it is alleged that moneys were withdrawn from the firm by the testator during his lifetime, and defendants interpose a counter-claim for the moneys thus withdrawn without their consent, the defendants, upon its appearing that the executors may probably make a distribution of the assets in their hands before the determination of the suit, may have an injunction to restrain them from so doing. Mitchell *v.* Stewart, *Ante*, 250.

8. An order of a surrogate required all persons having claims against a decedent to present the same, with the vouchers thereof, to B., at his office in C.—*Held*, that the order was invalid, for the reason that the statute declares the notice shall require all persons having claims against the deceased, to exhibit the same, with the vouchers thereof, to the "executor or administrator, at the place of his residence or transaction of business." Executors can not, in their representative capacity, appoint another person their attorney to dispute or reject claims against the estate. And an order that they publish a notice requiring the presentation of such claims to the attorney, instead of themselves, is a plain departure from the statute. *Supreme Ct.*, 1867, Hardy *v.* Ames, 47 *Barb.*, 413.

LIMITATION OF ACTIONS, 3, 4, 6; PARTIES, 3, 8.

EXTENSION OF TIME.

1. Obtaining an extension of the time to answer a complaint involves an admission that the complaint requires an answer, and is a waiver of an objection that the demand of relief contained in it does not conform to the notice in the summons. Garrison *v.* Carr, *Ante*, 266.

1. An order extending time to answer supersedes a prior motion, noticed, to strike out portions of the complaint, and operates as a bar to a future

motion, unless by the terms of the order the right to mak tion already noticed is given. *N. Y. Com. Pleas Sp. T.*, James, 34 *How. Pr.*, 238.

REFERENCE, 7–9.

FILING.

CHATTEL MORTGAGE; NOTICE, 1; UNDERTAKIN(

FORECLOSURE.

1. That a person who is not joined as a party to an action cannot be affected by the decree,—see Peabody *v.* Roberts Sutherland *v.* Rose, *Id.*, 144; Campbell *v.* Swan, 48 *Id.*, 1 pare Craig *v.* Ward, *Ante*, 235.
2. It is no objection to proceedings in foreclosure that the c the final judgment of foreclosure and sale was rendered up in of the referee's report was not held by the same judge the preliminary judgment, ascertaining and settling the rig ties, and ordering the reference. After the judge who first has adjusted the rights of the parties, and determined tha is a valid and subsisting security, it is his duty to ascert due upon it; and he has full power to order a reference to amount, and also the amount of prior incumbrances. Thi judgment is rendered merely in aid of the final judgment. 1867, Chamberlain *v.* Dempsey, 36 *N. Y.*, 144.
3. The question of costs may properly be reserved until the fina
4. That a judgment of foreclosure and sale, which is subseq no longer operates as a discharge of the mortgage,—see Sts bins, 47 *Barb.*, 212.
5. On the day of a sale in foreclosure of property consisting York City, the defendant attended, and presented a writt the corner lot, which was the most valuable, should be referee, however, directed the sale to proceed in a different property was bought in by the plaintiff. It appearing th was made in good faith, and in the belief that it woul amount realized, and no satisfactory reason for denying th shown,—*Held*, that the sale should be set aside, and a r King *v.* Platt, *Ante*, 434.
6. On a proceeding for the distribution of surplus moneys a sale of mortgaged premises under a decree for the foreclosu mortgage, the holders of a fourth mortgage may set up, bef usury in a third mortgage. If the third mortgage is affe with usury, it is void as to the holders of the fourth mortg

them, is not a lien, either at law or in equity, on the surplus moneys. *Supreme Ct.*, 1866, Mutual Life Ins. Co. of N. Y. *v.* Bowen, 47 *Barb.*, 618.

7. A foreclosure suit can not be said to have terminated, until the surplus moneys are disposed of in that suit. The court not only has the power, but it is its duty, in that action, to provide for the equitable distribution or disposition of the surplus moneys. The reference as to liens upon the surplus moneys, in a foreclosure suit, though arising on the reference, is a direct issue, necessarily to be determined before the court can finally and completely administer the whole of the fund resulting from the sale of the mortgaged premises. *Ib.*

8. Before a mortgage can be foreclosed by advertisement, it is necessary that the same, containing the power of sale, should be duly recorded. If the premises consist of distinct farms, tracts or lots, situated in different counties, the mortgage must be recorded in the clerk's office of each county. If it is so recorded, the notice of sale may be published in a newspaper printed in either of them. *Supreme Ct.*, 1867, Wells *v.* Wells, 47 *Barb.*, 416.

9. But where the land lies in several counties, the notice of sale must be affixed on the court-house door in each county, and a copy delivered to the clerk of each county. *Ib.*

10. The statute requires that when mortgaged premises consist of distinct farms, tracts, or lots, they shall be sold separately. If sold together, the sale will be void, or at least voidable. *Ib.*

11. The affidavits filed upon a foreclosure by advertisement did not show that the places to which the notices mailed to the parties were addressed were the residences of such parties.

Held, 1. That the averment omitted was necessary to make proof of good service.

2. That the court had no power, in an action of ejectment brought under a purchase at the sale, to allow the party to amend the affidavit so as to state the facts omitted. The statutory proceedings to foreclose a mortgage are not *proceedings in court*, so as to authorize the court to supply omissions, or remedy defects in the affidavits. *Supreme Ct.*, 1865, Dwight *v.* Phillips, 48 *Barb.*, 116.

REFERENCE, 3.

FORMER ADJUDICATION.

1. A judgment of nonsuit, in a former action for the same cause, is not a bar to a subsequent action for legal relief. Gerregani *v.* Wheelright, *Ante*, 264.

2. A judgment dismissing a supplemental complaint filed by a representative of a deceased plaintiff, who has not legal capacity to sue, granted at the trial, solely on that ground, is not a bar to a farther prosecution of the action

by a proper representative who has such capacity. *N.* 1863, Robbins *v.* Wells, 1 *Robertson*, 666.

3. R. brought a suit against the present defendants and D. t in foreclosure, for fraud affecting the title under which th given. While the action was pending, the present plai mortgage. R. afterwards recovered judgment that the s fraud in the mortgage, &c.—*Held*, that the report of a r judgment in that action, were admissible on behalf of the present action—which was to recover damages for fraud plaintiff to buy the mortgage;—and that they were concl fendants, as to the facts adjudged. Craig *v.* Ward, *Ante*,

FRAUD.

1. Contemporaneous acts are always competent as eviden charge of fraud. *N. Y. Superior Ct.*, 1864, Lalor *v.* Fish 669.
2. It is a fraud in law for one who is an agent to purchase fill the order with property of which he is the owner, conc of his ownership; and the principal, on discovering the b dence, is entitled to rescind. Conkey *v.* Bond, *Ante*, 415.
3. The facts that the agent acted without compensation, and to defraud, and made no false representations, are immater
4. It appearing, on appeal, in an action to rescind such a sale, without his principal's knowledge, sold as owner what he b a judgment dismissing the complaint will be set aside, and lute for the plaintiff (the principal) ordered. *Ib.*
5. Where it appears that just before making an assignment of creditors the assignor bought goods largely, representin solvent, the assignment will be set aside in favor of a rec in supplementary proceedings. Kennedy *v.* Thorp, *Ante*, 1
6. The purchase of goods, accompanied by such representati scheme of fraud, of which the assignment will be deemed s
7. The receiver is not estopped from proving the fraud by t judgment creditor who procured him to be appointed case waived the fraud by bringing an action for goods ered. *Ib.*
8. Where a person makes a false statement, not knowing tha knowing facts sufficient to put him upon inquiry, he is liab quences to the same extent as if he had actual knowledge. *Ante*, 235.

ISSUES, 2, 3; QUESTIONS OF LAW AND FACT.

HABEAS CORPUS.

1. On *habeas corpus* the judge before whom it is returnable will not review the decision of the judge of another court, that the warrant upon which the defendant was arrested was properly issued, and the defendant was legally held, where the same objections to the warrant and arrest were relied on upon the issuing of the *habeas corpus*. The remedy of the defendant in such cases is by *certiorari*. *N. Y. Com. Pleas Chambers*, 1867, Matter of Place, 34 *How. Pr.*, 259.
2. Under the acts of Congress of 1862–64, the courts of the States should not exercise jurisdiction to discharge men enlisted in the army of the United States. O'Conner's Case, *Ante*, 137.

CITY JUDGE.

HIGHWAYS.

1. Penalty for suffering animals to run at large on highways. *Laws of* 1862, 844, ch. 459, § 1, as amended 2 *Laws of* 1867, 2036, ch. 814, § 1.
2. Stray animals may be seized. *Id.*, § 2.
3. "Whenever any such person or any officer shall seize and take into his possession any animal under the authority of the preceding sections, it shall be the duty of such person or officer to make immediate complaint in writing, under oath, stating the facts, to a justice of the peace of the town in which such seizure occurred; and such justice shall thereupon have jurisdiction to hear and determine such matter, and shall thereupon proceed in the same manner as in civil actions, except as specially changed in this act, and shall forthwith issue a summons, under his hand, stating the fact of such seizure and complaint, and requiring the owner of such animal, or any party having an interest in the same, to show cause before such justice, at a time and place to be specified in said summons, why said animal should not be sold, and the proceeds applied as directed by this act; such time shall not be less than ten nor more than twenty days from the issuing of such summons." *Laws of* 1862, 844, ch. 459, § 3, as amended 2 *Laws of* 1867, 2037, ch. 814, § 3.
4. "The said summons may be served by any constable of the said town, or by any elector thereof authorized so to do by the said justice, in writing thereon; such service shall be made by posting the same in at least six public and conspicuous places in said town, and one of said places shall be the nearest district school house, unless the said seizure shall have been made within the bounds of an incorporated village, having the schools in charge of a board of education, and in such case one of such notices shall be posted in one of the buildings in which such schools are taught." *Ib.*
5. "At the time and place appointed for the return of said summons, the complainant aforesaid may appear, and any party or person owning or having an interest in said animal, or his agent duly authorized, shall be allowed by the said justice to appear in said proceeding; and on his filing with said justice an answer under oath, subscribed by him or his agent

aforesaid, denying any or all the facts alleged in said com
shall be deemed joined in the said proceeding, and the s
ceedings shall be as in civil actions, so far as they can be, a
provided in this act. If no one shall appear to show cause
summons shall be returned by a constable duly served, or
ing that fact, if served by any person other than a constab
or the justice shall find, after a trial, that no sufficient reasc
such sale should not be made as directed by this act, then
shall issue his warrant, under his hand, directed to any c
said town, commanding him to sell the said animal at pul
the best price he can obtain therefor, and make return the
justice, at a time and place therein specified, not less than
than twenty days thereafter." *Ib.*

6. "The said sale shall be made on like notice as on constab
process; and the said constable shall make return as requi
warrant, and pay the proceeds of said sale to said justice."

7. "The said justice shall thereupon adjudge the costs of sa
the same amounts being allowed as in civil actions; and
shall allow to the party or officer making such seizure, for
colt, $1; for every cow, calf, or other cattle, each 50 cts.;
goat, sheep or swine, 25 cts., together with the actual dan
by such party by reason of the trespass or breaking of su
his premises, and a reasonable compensation to such perso
be estimated by such justice, for the care and keeping of
from the time of the seizure thereof to the sale; and the s
be allowed the sum of $1 for each animal so sold; and the
same fees as for service of a summons and execution in civ
the penalty in the foregoing sections prescribed shall be p
seers of the poor, or the officer of the board having the
poor in charge." *Ib.*

8. "If after paying the sums aforesaid, there shall be any sur
ceeds of said sale, the said justice shall pay the same to the
establishing before him on the return of said summons or
time as he shall appoint, the right to the same. If no per
said surplus within one year after such seizure, the said ju
the same to the overseers of the poor of such town, or the
aforesaid, for the benefit of the poor thereof. If such own
terested shall not appear and demand such surplus within
shall be forever precluded from recovering any part of suc
the receipt of the overseers of the poor of said town, or
aforesaid, given at any time after the expiration of said y
full discharge to said justice for the same." *Ib.*

9. "Any owner of any animal which shall have been seized
suant to the foregoing provisions, may, at any time bef
aforesaid shall proceed to the hearing on the return of said
mand, and shall be entitled to the possession of such ani
payment to said justice of the several sums hereinbefore
paid to the said justice and constable and to the person or o
the seizure aforesaid shall have been made, and the pen
when such seizure is made by any officer, together with a re
pensation to the person or officer making such seizure, for
keeping of such animal, to be ascertained and fixed by suc
upon making to such justice satisfactory proof of ownership
owner shall not have appeared upon said return and shal

non-appearance to the satisfaction of said justice, and shall make such demand at least three days before the time appointed for such sale, he shall be entitled to the custody and possession of such animal, upon paying one half of the several sums above stated, together with the whole amount of penalty, compensation and damages which the said justice shall then adjust and award." *Laws of* 1862, 845, ch. 459, § 4, as amended 2 *Laws of* 1867, 2039, ch. 814, § 4.

10. "In case the animal so seized under the foregoing provisions of this act, shall have been so running at large or trespassing, by the willful act of any other person than the owner, to effect that object, such owner shall be entitled to the possession of such animal, at any time before the actual hearing shall be commenced on the return of said summons, on making the demand therefor, and the proof required in the next preceding section, and on paying to such person or officer making such seizure the amount of compensation fixed by such justice for the care and keeping of such animal, and without paying any other charges. And the person committing such willful act shall be liable to a penalty of $20, to be recovered in an action at law at the suit of the owner of said animal, or the person or officer making such seizure." *Id.*, § 5.

11. "In case any person making such seizure shall fail on said hearing to show cause sufficient to obtain such sale, the said justice shall render judgment against him for costs. And if the jury or said justice shall find from the evidence that such seizure was malicious and without probable cause, the jury or the justice may assess the amount of damages sustained by the owner, by means of such seizure, and judgment shall in such case be given for double the amount assessed with costs." *Laws of* 1862, 844, ch. 459, § 7, added by 2 *Laws of* 1867, 2041, ch. 814, § 6.

12. "An appeal may be taken by either party who shall have appeared and contested in said proceeding before such justice, to the county court; and all laws relating to appeals from judgments of justices' courts, and the jurisdiction, powers and duties of county courts to hear and determine such appeals, and the proceedings therein, shall be applicable to said appeals, so far as the same can be applied and are consistent with this act. Such appeal can only be taken from the finding or determination that cause exists or does not exist for the sale aforesaid, and must be taken within ten days after such finding or determination; and such appeal when made by a claimant shall not effectual for any purpose unless the undertaking required on appeals to the county court, contains a clause that in case the finding or determination shall be affirmed, the claimant will pay all such sums as the said justice shall determine and adiudge for the costs, penalties and allowances so as aforesaid authorized to be made. In case of an affirmance by the county court, said court shall appoint a time and place when said justice shall adjust the same, and such adjustment shall be made in the manner and for the sums hereinbefore specified. In case such undertaking is given and approved by the said justice, he shall forthwith direct the said sale not to be had, and shall order the said animal to be delivered to the appellant, if it shall appear to him that he is the owner, or entitled to the possession thereof." *Laws of* 1862, 844, ch. 459, § 6, added by 2 *Laws of* 1867, 2040, ch. 814, § 5.

HUSBAND AND WIFE.

ALIMONY; CAUSE OF ACTION, 9–11; COMPLAINT, 7–9; CREDITOR'S ACTION, 4; DEFENSES, 7; DIVORCE; JUDGMENT, 12.

IMPRISONMENT.

EXECUTION.

INDICTMENT.

1. It is not a valid objection to an indictment, that it recites in which the statute under which the defendant was indicte the legislature; provided the statute was in force when the in the indictment was committed. *Supreme Ct.*, 1866, F 47 *Barb.*, 235.
2. Under a statute which declares punishable any person having administered, or of having caused to be administe or, &c.," a count in an indictment which charges that th administer and did cause to be administered, &c., will not duplicity as charging two distinct offenses. [15 Pick., 273 Halst., 203; 4 Carr. & P., 368.] *Supreme Ct.*, 1865, La 33 *How. Pr.*, 66; affirmed, 34 *N. Y.*, 223.
3. In an indictment for perjury it is not necessary to specify mode in which the prisoner was sworn. An averment tha administered by the magistrate in due form of law is suffi *Appeals*, 1867, Tuttle *v.* People, 36 *N. Y.*, 431.

INJUNCTION.

1. An injunction pending suit is never granted when the mate are made upon information only; and it is refused, as a gen cases where such material allegations are denied by the pa be restrained. *N. Y. Superior Ct. Sp. T.*, 1865, Pidgeon *Robertson*, 706.
2. An injunction will be granted to restrain the Croton Aque the City of New York from cutting off the Croton water f tiff's building, on the ground of non-payment of the water-r rate charged by them, and for non-payment of which they the supply, is more than is authorized by law. Cromwel *Ante*, 26.
3. An injunction will not be granted to restrain the police autl the metropolitan police district from placing policemen in fr house, in which guests have been repeatedly subjected to u tant, and illegal charges, and from giving warning to "str to enter to "be careful." *N. Y. Com. Pleas*, 1867, Prendori 34 *How. Pr.*, 416.

4. An injunction cannot be granted upon the ground of nuisance, to restrain acts done in the lawful exercise of authority. Masterson *v.* Short, *Ante*, 154.
5. An injunction may be granted by a State court to restrain persons from prosecuting a claim before an American consul abroad, where the consul has not jurisdiction of the proceedings instituted before him. Dainese *v.* Allen, *Ante*, 212.
6. An injunction will be granted where the design of the defendant to defraud, by manufacturing and packing an article under a trademark in all respects similar to plaintiff's, excepting only the use of his name, plainly appears. *Supreme Ct.*, 1867, Gillott *v.* Esterbrook, 47 *Barb.*, 455.
7. A warrant of dispossession in summary proceedings to recover the possession of land, will be stayed by injunction, where it appears that the possessor summoned had not time to arrive at the court room before the hearing, after the service of the summons. *N. Y. Superior Ct. Sp. T.*, 1864, Griffith *v.* Brown, 3 *Robertson*, 627.
8. Costs of *unsuccessful* efforts to remove an injunction can not be said to be damages arising from its existence, so as to be recoverable upon an undertaking given on granting the injunction. Costs and counsel fees on a *successful* motion to dissolve an injunction, however, are considered the natural consequences of its existence, and are properly damages; but there is no reason why the party obtaining the injunction should pay the expenses of ill-directed efforts to get rid of it. *N. Y. Superior Ct.*, 1865, Childs *v.* Lyons, 3 *Robertson*, 704.

TRADEMARKS.

INSOLVENCY.

1. The history of the legislation of the State on the subject of insolvents' discharges,—reviewed; and former decisions,—compared. American Flask & Cap Co. *v.* Son, *Ante*, 333.
2. A discharge in insolvency, granted under the laws of New York, is not rendered invalid by the fact that the petitioner omitted to give notice of the proceeding to the creditor who impeaches the discharge; nor by the fact that he omitted to name such creditor in his schedule of creditors, unless a fraudulent purpose in such omissions is proved. *Ib.*
3. The published notice of an order to show cause, stating that the proceeding is for the discharge of an insolvent from his debts, need not specify the particular statute under which it is had. *N. Y. Superior Ct.*, 1863, Soule *v.* Chase, 1 *Robertson*, 222.
4. The petition and schedule of an insolvent debtor need not state the grounds of the demands of creditors with the same particularity as is required in a statement for a judgment by confession under the Code. *Ib.*

BAIL.

ISSUES.

1. Every thing should be excluded from issues to be tried, in divorce, except what will affect the decision. Both parties point out the particular circumstances intended to be est reasonable precision as to time and place, as well as person *rior Ct.*, 1865, Strong *v.* Strong, 3 *Robertson*, 719.
2. Issues involving a charge of fraud should be framed in so as to inform the party charged precisely what he is req Wood *v.* Mayor, &c. of New York, *Ante*, 467.
3. Form of issues, settled for jury trial, in an action by a mun tion to annul a lease procured *to* the corporation, on the gr practiced in procuring the corporate officers to enter into it

JOINDER OF ACTIONS.

Causes of action on several judgments cannot be united in on all the debtors in the judgments are the same, and are ma *N. Y. Superior Ct.*, 1863, Barnes *v.* Smith, 1 *Robertson*, 69

JOINT DEBTORS.

1. To a proceeding under section 375 of the Code, for the pur a defendant adjudged to be bound by a prior judgment ent tion, after service of process upon his former partner and only, who allowed judgment to be entered for want of a statute of limitations can not be set up as a defense, althou against the demand before the service of process upon the *preme Ct.*, 1867, Berlin *v.* Hall, 48 *Barb.*, 442.
2. After a transcript of a judgment of the marine court for n exclusive of costs, recovered in an action commenced by t process on one only of several defendants jointly indebted, in the office of the county clerk, the plaintiff may issue a su New York common pleas (under section 375 of the Code c to a joint debtor not served, requiring him to show cause w not be bound by the judgment. Ticknor *v.* Kennedy, *Ante*,
3. Section 136 of the Code does not alter any fundamental pri as to the joint liability of joint contractors, but is merely int the common law in a point of practice. *N. Y. Superior Ct.* *v.* Battershall, 2 *Robertson*, 146.
4. The legislature intended by that section to change the fo practice, by which, if any number of persons or joint con

sued, it was necessary to prove and establish an entire case against all the defendants, or the action would fail, so that the plaintiff might recover against so many of the defendants whom he can prove a joint contract, and a consequent joint liability. *Ib.*

JOINT STOCK ASSOCIATION.

1. The effect of the statutes of the State of New York relative to joint stock associations, when read together, is to give such associations all the qualities or attributes of corporations, except the right to have and use a common seal. Waterbury *v.* Merchants' Union Express Co., *Ante*, 163.
2. Proceedings for the dissolution of joint stock associations, in cases of insolvency, are to be conducted mainly according to the methods employed in the case of insolvent corporations, and not according to those derived from the law of simple partnership. *Ib.*
3. What facts will constitute a case of insolvency, such as will warrant the court, on the application of a stockholder in a joint stock association, in appointing a receiver and decreeing a winding-up of the association. *Ib.*

JUDGMENT.

1. Although the Code of Procedure attempts to abolish the distinctions between proceedings at law and in equity, yet it is evident, from the nature of the case, that judgments at law and in equity can not be assimilated. *Ct. of Appeals*, 1866, Butler *v.* Lee, 33 *How. Pr.*, 251.
2. The final decree of a court of equity takes effect when it is made and declared by the court; in common law actions no judgment is pronounced, except by the record, which is made up in the clerk's office. *Ib.*
3. Although the court retains enough control of an action, after judgment, to carry it into effect, the judgment disposes of the rights of the parties. *N. Y. Superior Ct. Sp. T.*, 1864, Prentiss *v.* Machado, 2 *Robertson*, 660.
4. There is no such thing permissible as an interlocutory judgment in any case. The only judgment authorized or permitted by the Code is a "final determination of the rights of the parties to the action." No judgment can now be considered as final which expressly reserves any question whatever for future consideration and determination by the court. *N. Y. Superior Ct. Sp. T.*, 1865, Belmont *v.* Pouvert, 3 *Robertson*, 693.
5. A determination in writing, entered as a judgment, in which not only the question of costs is expressly reserved, but which contemplates and provides for further action by the court, upon the coming in of the report of a referee appointed by it, is not the final judgment of the court, but is, at most, an order, and will be vacated and set aside, on motion, so far as it purports finally to adjudicate and determine the rights of the parties. *Ib.*

6. Irregularity in form does not render a judgment void. Th
can only be taken advantage of by the party, on motion.
1866, Bennett *v.* Couchman, 48 *Barb.*, 73.

7. Where the clerk of the superior court docketed a judgment
transcript, which was filed in the county clerk's office, as req
but no actual entry was made in the judgment book of the
clerk, until after execution had issued upon the judgment,—
was a substantial compliance with section 280 of the Code, a
parties to the judgment; and that the docket in the county
was sufficient foundation for the execution. *N. Y. Superi*
Appleby *v.* Barry, 2 *Robertson*, 689.

8. In an action tried by the court without a jury, the only auth
entry of the judgment by the clerk is the formal decision
judge before whom it is tried. If the judgment contain an
the decision, it is not an irregularity merely, but a substanti
the judgment must be set aside on appeal. *N. Y. Superi*
Loeschigk *v.* Addison, 3 *Robertson*, 331.

9. The defendant served an offer, under section 385 of the Cod
ure, to allow plaintiff to take judgment for a specified sum
not being accepted, he served an answer setting up a c
On the trial the counter-claim was allowed, and the plainti
judgment for a sum less than the amount named in the offer.
gate, however, of the amount for which he recovered judgm
counter-claim extinguished by the judgment, exceeded
named in the offer.—*Held*, that the plaintiff was entitled to
recovery was more favorable than the offer, inasmuch as it
plaintiff by extinguishing the counter-claim, as well as by ent
the nominal sum awarded. Tompkins *v.* Ives, *Ante*, 267.

10. There is no objection to an entry of judgment upon an a
the defendant, in writing, of the facts alleged in the complai
order to save the necessity of proving those facts. A judgm
upon such written admission may be considered as a judgmen
default, the answer having been withdrawn. *Supreme Ct.*,
nett *v.* Couchman, 48 *Barb.*, 73.

11. Where an answer is stricken out as sham and irrelevant,
method of obtaining judgment is to proceed as if no answer h
in. If the summons be for relief, the defendant is entitled t
notice of application for judgment, after the answer has been s
N. Y. Superior Ct., 1863, De Forest *v.* Baker, 1 *Robertson*, 70

12. In all cases of a judgment against a married woman, it sh
pressly stated therein that the amount is "to be levied or colle
her separate estate and not otherwise;" and the execution sh
the judgment in its terms. *N. Y. Superior Ct.*, 1863, Baldwin
1 *Robertson*, 109.

13. Where parties reside within the jurisdiction of the court, and
two years have elapsed since the entry of judgment upon an i

service of notice thereof on the defendant, a motion to open the inquest and set aside the judgment will not be granted. *N. Y. Superior Ct. Sp. T.*, 1864, Hendricks *v.* Carpenter, 2 *Robertson*, 625.

CONFESSION OF JUDGMENT; EVIDENCE, 12, 13; FORECLOSURE, 2, 4; FORMER ADJUDICATION.

JUDICIAL SALE.

1. A judicial sale,—*e. g.*, a sale by a referee in foreclosure,—is not void because it was made upon election day. Such sale is not business of a court, within the statute prohibiting such business on election days. King *v.* Platt, *Ante*, 434.
2. That one who purchases under a judgment for foreclosure thereby submits himself to the jurisdiction of the court; and he may be compelled, on motion, to comply with the conditions of sale,—see Cazet *v.* Hubbell, 36 *N. Y.*, 677.
3. A person at a judicial sale can not be compelled to take title, when a person who if living would have an interest in the property, is not proven to be dead, merely because such person has been absent, unheard of, for seven years. The presumption of death, arising from such absence, is not a sufficient basis for the title. McDermott *v.* McDermott, *Ante*, 451.
4. A sale of lands in foreclosure is void where the auctioneer bids in the property on behalf of the mortgagee, and it does not appear that any other persons were present. Such a sale is not a sale of the premises at public auction within the meaning of the statute. There can be no legal auction if no one is present but the auctioneer; and the sale should be postponed. *So held*, in a case of foreclosure by advertisement. *Supreme Ct.*, 1865, Campbell *v.* Swan, 48 *Barb.*, 109.

FORECLOSURE, 5; MOTIONS AND ORDERS, 9.

JURISDICTION.

1. National banks doing business in one State are not, as such, exempt from liability to be sued in the courts of another State. Cooke *v.* State National Bank of Boston, *Ante*, 339.
2. A court of equity will not sustain a bill against parties residing within its jurisdiction in respect of property and claims thereto which they hold merely as agents of a foreign government, over whom, upon general principles of international law, the courts could exercise no jurisdiction. The claimants in such case have no redress in the courts of justice of this country; but any wrong done them (if not a *casus belli*) must be subject of diplomatic negotiation between the government of the United States and the foreign principal. Leavitt *v.* Dabney, *Ante*, 469.

3. Neither the treaties of 1830 and 1860, between the Uni Turkey, nor the acts of Congress respecting consuls, operat American consuls residing in Turkey jurisdiction to adjud Dainese *v.* Allen, *Ante*, 212.

JUSTICES' COURTS.

1. A summons in a justice's court is a "writ," within the i internal revenue law, and requires a stamp. *Supreme Ct.*, Bell, 48 *Barb.*, 194.
2. Where a summons in an action in a justice's court is retu day of a general election, and there is no appearance, the j no jurisdiction—not even to adjourn the proceedings to People *ex rel.* Monday *v.* Schwartz, *Ante*, 395.
3. A judgment entered upon such adjourned day may be reve *rari*. *Ib.*
4. An attachment issued by a justice of the peace,—*Held*, voi jurisdiction, because:

   1. The affidavit upon which it was issued did not allege th edness sued upon existed "over and above all discounts." sential part of the affidavit.

   2. The affidavit did not state that the defendant's leavin (which was the ground of the application), was done with defraud his creditors.

   3. The bond executed did not comply with the requir statute. Until a bond conformable to the statute has been delivered to the justice, no attachment can properly be issue will be void if the condition is not such as the statute requi *Ct.*, 1866, Kelly *v.* Archer, 48 *Barb.*, 68.
5. In an action before a justice of the peace for trespass on la tiff, in his complaint, described his entire farm of seventy a and bounds, and alleged the trespasses to have been commi and claimed damages in gross "for the several aforesaid tr grievances;" and the defendant interposed a general denial, up a separate defense, alleging title in himself to a certain p premises, describing it by metes and bounds, and alleging th one" of the alleged trespasses were committed on that piece justice discontinued the whole action; and, on the trial in court, no evidence was given of any trespass on this partic land, and no question of title was raised by the proofs, and that the trespasses were committed on the plaintiff's land, there was no question of title, and the damages awarded some $26.—*Held*, that the defendant was entitled to costs. 1857, Shall *v.* Green, 34 *How. Pr.*, 418.
6. A justice of the peace has no power to grant an amendment

plaintiff to strike out the name of a defendant from the summons, after service thereof, and to proceed to trial and judgment against the other defendant alone. *Supreme Ct.*, 1867, Gilmore *v.* Jacobs, 48 *Barb.*, 336.

7. A notice of appeal from a judgment of a justice of the peace may be signed by any person at the request of the appellant; and it is not necessary that the person so signing should be admitted to practice in courts of record. *Supreme Ct.*, 1866, Hall *v.* Sawyer, 47 *Barb.*, 116.
8. On appeal from the judgment of a justice, the objection that the *summons* was not stamped may be taken on the argument, notwithstanding it is not specified in the notice of appeal. *Supreme Ct.*, 1866, Cole *v.* Bell, 48 *Barb.*, 194.
9. But the objection that the *notice of appeal* was defective for want of a stamp can not be taken upon the argument of the appeal. It can only arise on a motion to dismiss the appeal. *Ib.*

JURY.

TRIAL.

LANDLORD AND TENANT.

CAUSE OF ACTION, 12–15; COUNTER-CLAIM, 4, 5; SUMMARY PROCEEDINGS.

LIMITATIONS OF ACTIONS.

1. Debts due to an attorney or counselor for costs or professional services are subject to the same disabilities as those due to merchants, physicians, or any other class. If an indebtedness exists, it is barred at the expiration of six years, if no circumstances are shown which save it from the operation of the statute. *Ct. of Appeals*, 1867, Adams *v.* Fort Plain Bank, 36 *N. Y.*, 255.
2. An action brought to recover the penalty imposed upon trustees of manufacturing companies incorporated under the general act of 1848, for neglect to file and publish an annual report of the condition of the company, as required by section 12 of said act, and also for declaring and paying dividends while the company is insolvent, in violation of section 13 of the same, is an action brought upon a statute for a penalty given to the party aggrieved, and therefore must be commenced within three years from the time the cause of action accrued. *Ct. of Appeals*, 1866, Merchants' Bank *v.* Bliss, 35 *N. Y.*, 412.
3. The successors of a removed administrator, who were also interested in the estate as legatees, filed a petition before the surrogate, praying an accounting by their predecessor, and that he be ordered to pay over the

amount found due. Nearly ten years having elapsed betwee
and the petition, the predecessor pleaded the statute of limi

Held, 1. That there being no authority for a petition in t
ters of legatee and successor in administration, and the relie
such as could only be given to persons interested in the esta
the proceeding must be deemed to be instituted by the peti
character.

2. That, so regarded, it was barred by lapse of time.
Ante, 245.

4. The limitation of six months, in the Revised Statutes, witl
action must be brought against an executor or administ
claim which has been exhibited and rejected, is only appli
where the presentment and rejection of the claim occurs afte
tion of notice requiring creditors to present their claims, as
the statute. An executor or administrator can not avail h
limitation, unless he has strictly complied with the statute,
lished the proper notice. *Supreme Ct.*, 1867, Hardy *v.* Am
413.

5. Actions for any cause of action, arising out of any proceed
act of Apr. 23, 1862,—to prevent animals from running at
public highways,—can only be commenced within one y
cause of action shall have accrued. 2 *Laws of* 1867, 2041, c

6. A demand which has already been outlawed at the death o
debtor, can not be revived by a part payment made by his a
If an administrator has power to revive such a demand at all
consent of those interested in the estate, it can only be
express promise to pay. McLaren *v.* McMartin, *Ante*, 345.

7. An indorsement made upon a note, by the payee, admitting r
payment, is not sufficient, by itself, to prove a part payment
pose of removing the bar of the statute of limitations, and
payee to maintain an action for the balance. When so off
dorsement must be regarded as a mere declaration, by the p
own favor. *Ib.*

MALICIOUS PROSECUTION.

1. To maintain an action for malicious prosecution, the plaintiff r

1. That the defendant instigated the prosecution against th
2. That such prosecution was without probable cause.
3. That it was accompanied with malice, and terminated
the party prosecuted.

Both malice and a want of probable cause for the former s
alleged and proved. If there was probable cause, the action
maintained, even though the prosecution complained of wa
Want of probable cause cannot be inferred from any degre
which may be shown. *Supreme Ct.*, 1866, Miller *v.* Milligan,

2. If in an action for malicious prosecution, there is an entire absence of proof to show that the defendant was the real prosecutor in the former suit, or if he was, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge then made, the plaintiff should be nonsuited. He has no legal right to ask a submission of the facts to the jury. But whether or not the defendant instigated the prosecution complained of, against the plaintiff, is a question of fact for the jury; and if there is any evidence whatever, upon that point, however slight it may be, the court is not authorized to dismiss the complaint, and take the case from the jury. *Ib.*
3. What constitutes probable cause does not depend upon the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. The real question is, whether the defendant had reasonable ground for believing that the plaintiff was guilty of the charge made against him. This belief may be founded upon facts within the knowledge of the parties, or upon information derived from other persons. If he has proof of the facts, in the affidavit of another, and he believes the truth of that person's statement, and proceeds against the plaintiff upon that proof, and under the belief in its truthfulness, he will be deemed to have had probable cause for so doing. It is sufficient that such information was furnished to the defendant as of itself would authorize and justify his action. *Ib.*
4. An abandonment of the charge and discontinuance of the prosecution, is equivalent to a discharge from the accusation. *Ct. of Appeals*, 1867, Fay *v.* O'Neill, 36 *N. Y.*, 11.

MANDAMUS.

The general rule is that mandamus will not lie where an adequate remedy at law exists; but where the remedy by action is doubtful, it will lie. *Supreme Ct.*, 1866, Clark *v.* Miller, 47 *Barb.*, 38.

CORPORATIONS, 1.

MARINE COURT (OF NEW YORK).

Authority conferred to appoint two stenographers and an interpreter. Their oath, duties, fees, &c., prescribed. Interpreter who willfully interprets falsely, punishable for perjury. Section 260 of Code of Procedure declared applicable to marine court. 2 *Laws of* 1867, 1933, ch. 784.

MECHANICS' LIENS.

1. An appeal from a judgment under the mechanics' law stays only so much of the proceedings under the judgment, as a judge of the court below, or

a judge of the appellate court, shall order to be so stayed ing of the appeal. Van Cleve *v.* Abbatt, *Ante*, 144.

2. Under a judgment exempting property from a mechanic' may be discharged of record, notwithstanding an appeal, ings have been so stayed. *Ib.*

MERGER.

The rule that although there is a unity of two estates in one no merger will take place if the circumstances show an int the two interests distinct,—applied in a peculiar case. Sh ton, *Ante*, 197.

MOTIONS AND ORDERS.

1. A motion to vacate an order of arrest does not embrace a duce the bail, although it includes an application for furthe The questions involved in the two motions are entirely di pendent on different facts. *N. Y. Superior Ct.*, 1864, Sm 3 *Robertson*, 615.
2. Where orders of arrest are sought to be vacated on the g return day had been changed, the irregularity should be the moving papers. A statement in the defendant's affid time of his arrest the orders had no legal effect, for the r return day had expired, is not sufficient notice of the pa relied on. *N. Y. Superior Ct.*, 1864, Lalor *v.* Fisher, 2 *Ro*
3. A motion to vacate an order for examination of a witness i in that it was granted without notice, must specify that gr larity, otherwise it cannot be urged upon the hearing. Br *Ante*, 124.
4. A motion to set aside a complaint in an action commenced for non-conformity with the summons, can not be made b mons has been served. *N. Y. Superior Ct. Sp. T.*, 186 Young, 3 *Robertson*, 666.
5. Where there are two separate defenses set up by the an objection, on the trial, that the answers do not set out suffi constituting the defenses, or either of them, is not available of the plaintiff, in such cases, is by motion to compel th make his answer more definite. *Ct. of Appeals*, 1866, Ker *N. Y.*, 331.
6. Upon a motion to confirm a report of such commissioners, to object to a member of that body upon the ground of pe Such objection is maintainable only on the hearing of the their appointment; and from an omission to make it at t

sent to or waiver of the objection will be inferred. Matter of the Southern Boulevard, *Ante*, 447.

7. A mere oral decision of a court is of no avail without an order making it a record. An order is the only judicial mode of determining a motion. *N. Y. Superior Ct.*, 1864, Smith *v.* Spalding, 3 *Robertson*, 615.
8. An order placing a cause on the special calendar of short causes for trial, must be served on the adverse party, before the cause can be brought to trial under it. If service is omitted, an inquest taken under the order is irregular, and will be set aside on motion. Johnston *v.* Green, *Ante*, 342.
9. A lot of land was sold under a mortgage, and conveyed by the sheriff. After such conveyance, upon the application of the holder of a prior mortgage, the sale under the judgment was set aside, and the judgment opened. Subsequently a prior mortgage was foreclosed, the grantee in such conveyance being a party defendant in the action, and the premises were again sold, by which such grantee lost the property.—*Held*, that the effect of the order setting aside the sale and opening the judgment was to restore the lien and operation of the two prior mortgages, but that it did not operate as a disseizin of the purchaser's title. *N. Y. Superior Ct. Sp. T.*, 1864, Coit *v.* McReynolds, 2 *Robertson*, 655.

BAIL, 2–4; COSTS, 5–8; JUDGMENT, 13.

NE EXEAT.

The writ of *ne exeat* is abolished by the Code. The only cases in which arrest is now allowed in civil actions are those prescribed by the Code. *N. Y. Superior Ct.*, 1863, Johnston *v.* Johnston, 1 *Robertson*, 642.

NEW TRIAL.

1. Motions for a new trial on the ground of surprise are addressed very much to the sound discretion of the court, and if it satisfactorily appears that to promote the ends of justice an opportunity should be presented for the introduction of new testimony, the court will furnish it by setting aside the verdict, and granting a new trial. *Supreme Ct.*, 1866, Tyler *v.* Hoornbeck, 48 *Barb.*, 197.
2. Where the alleged surprise consisted in calling one of the defendants as a witness for the plaintiff, in violation of a promise claimed to have been made by the plaintiff's attorney to the defendant's attorney, by reason of which the latter was unprepared to impeach the witness as he would have been had such promise not been made;—*Held*, that the discretion of the court was properly exercised in granting a new trial on terms. *Ib.*
3. Evidence of the admission by one party to an action, of a fact or occurrence, material to the issues therein, and made before the trial, in regard to which his testimony on the trial conflicted with that of the adverse

party, but not known or discovered, or likely to be, by the latter, before such trial, is newly-discovered evidence such as requires the granting of a new trial. *N. Y. Superior Ct.*, 1863, Oakley *v.* Sears, 1 *Robertson*, 73.

4. A verdict for $5000, in an action for seduction of plaintiff's daughter, resulting in her pregnancy and death,—*Held*, not so extravagantly excessive as to imply partiality, corruption, or undue influence, or to authorize the court to interfere with the verdict. *Supreme Ct.*, 1866, Ingerson *v.* Miller, 47 *Barb.*, 47.

5. On a motion for a new trial the court will refuse to set aside the verdict, if the plaintiff will consent to deduct the amount deemed excessive. *Ct. of Appeals*, 1866, Sears *v.* Conover, 33 *How. Pr.*, 324.

6. The provision of 2 *Rev. Stat.*, 145, § 40,—that in actions for divorce on the ground of adultery, the court may, if the offense charged is denied, award a new or further trial as often as justice shall seem to require,—was intended to award a new trial of the issue upon the charge of adultery; and does not relate to the trial of any other issue. Amory *v.* Amory, *Ante*, 16.

7. The statute does not authorize a new trial to be granted to a plaintiff whose action was dismissed upon the first trial for her failure to prove her marriage with the defendant. *Ib.*

8. The provision of section 3 of *Laws of* 1855, 613, ch. 337,—that on writ of error to review a conviction for a capital offense, the appellate court may order a new trial if "satisfied * * * * that justice requires a new trial, whether any exception shall have been taken or not in the court below,"—does not permit an appellate court to disregard an error adverse to the prisoner, committed in the proceedings below, upon the ground that upon the whole case the guilt of the prisoner is clear. O'Brien *v.* People, *Ante*, 368.

9. That act was intended to enable the courts to grant a new trial asked on behalf of a prisoner, notwithstanding technical omissions by his counsel on the trial; it does not authorize them to disregard any errors, which, prior to its passage, would have entitled a prisoner to a new trial. *Ib.*

10. The power conferred on the court of appeals by *Laws of* 1855, ch. 337, as amended *Laws of* 1858, ch. 330,—to grant a new trial in certain criminal cases, although no exception was taken below,—is confined to cases tried by the court of general sessions for the city and county of New York. It does not extend to causes tried in a court of oyer and terminer. McKee *v.* People, *Ante*, 216.

11. In what cases the supreme court will order a new trial of prosecutions for homicide. Manuel *v.* People, 48 *Barb.*, 548.

EXCEPTIONS, 1.

NEW YORK CITY.

1. "No judgment in actions on contract made in the year 1866 shall be entered by default or otherwise in any court against the mayor, aldermen and commonalty of the city of New York, except upon proof in open court, that the amount sought to be recovered in said judgment still remains unexpended in the city treasury to the credit of the appropriation for the year 1866 for the specified object or purpose upon which the claim sued for is founded; and hereafter all actions against the mayor, aldermen and commonalty of said city shall be brought in the supreme court of the first judicial district, which court shall have exclusive jurisdiction of such actions." 2 *Laws of* 1867, 1606, ch. 586, § 6.
2. Section 6 of the act of 1866, above-mentioned, applies to actions commenced prior to its passage, as well as to those thereafter to be commenced. The act does not affect the contract. It does not apply to the debt, but to the remedy. It delays the plaintiff's recovery until an appropriation to cover the claim is made. *Supreme Ct.*, 1867, Tribune Association *v.* Mayor, &c. of N. Y., 48 *Barb.*, 240.
3. Where, in an action against the corporation of New York for work and labor, the defendants in their answer admit the performance of the work and labor, and that a sum specified is due, the plaintiff will not be allowed to take judgment for the amount admitted to be due, unless evidence is furnished that a sufficient amount of the appropriation to the specific object, to pay the claim, remains unexpended, at the time of the application. *Ib.*
4. The notice required to be given to owners of buildings in New York city, under the act of 1862 (ch. 365),—to provide for the regulation and inspection of buildings, in cases of inadequate safeguards against fire,—must state the infringement with sufficient precision to leave no doubt as to the alteration or addition required. A notice stating the defect in the alternative is insufficient to ground an action for the violation of the statute. *N. Y. Superior Ct.*, 1863, Fire Department of N. Y. *v.* Williamson, 1 *Robertson*, 476.
5. The common council of the city of New York have the power to establish and regulate stands for hackney coaches in the streets and public places of the city, and persons keeping or occupying such stands within the permission or license given by the common council, and who are not misusing the privilege given them thereby, cannot be restrained by injunction, on the ground of injury caused by their competition to the business interests of the plaintiff. Masterson *v.* Short, *Ante*, 154.

NONSUIT.

DISMISSAL OF COMPLAINT; TRIAL, 3, 4.

NOTICE.

1. The proper time of filing a notice of pendency of action,—determined, in a particular case. Stern *v.* O'Connell, 35 *N. Y.*, 104.
2. A notice of protest which contains enough to apprise the indorser that the bill or note has not been paid at maturity, and that it has been protested for non-payment, with a reasonable identification of the particular bill or note intended, is sufficient in form. Artisan's Bank *v.* Backus, *Ante*, 273.
3. When a notice of protest bore no date, but contained the date of the note and the time it had to run, and was drawn in the present tense, and served on the day of protest, and thus gave the indorser the means of knowing the day on which the protest was made,—*Held*, that the omission to date the notice was not material, and did not defeat the right of action against the indorser. *Ib.*

OFFICERS.

1. A commissioner appointed by special statute to award damages for property taken in laying out a highway is not rendered incompetent from the fact of his owning land which has been taken for the improvement. A commissioner is a *quasi* judicial officer only, and is not within the application of the maxim precluding a person from acting as judge in his own case. Matter of the Southern Boulevard, *Ante*, 447.
2. The sureties of a public officer are not discharged from liability on the bond, by legislation subsequent to the delivery of the bond, which modifies the duties of the office, for the faithful performance of which by their principal the bond was given. People *v.* Vilas, *Ante*, 252.
3. The bond of a public officer is understood to be given subject to exercise of the constitutional power of the legislature to change the duties of the office; and the obligation of sureties extends to the faithful performance of the duties as they may from time to time be modified. *Ib.*
4. The fact that the bond, in a particular case, refers to a particular statute, as prescribing the duties of the officer, makes no difference. *Ib.*
5. The common law rule which allows a power of a public nature, vested in several persons, to be exercised by a majority of those intrusted with it, is not applicable to a case where the authority is conferred conditionally, and where the mode in which it is to be exercised is specifically defined by statute. [Overruling 15 Barb., 471.] *Ct. of Appeals*, 1867, People *ex rel.* Dann *v.* Williams, 36 *N. Y.*, 441.
6. An order made by two commissioners of highways, without the concurrence of their associates in office, is not rendered valid by the provisions of 1 *Rev. Stat.*, 525, § 125,—providing that any two commissioners of highways of any town may make any order in execution of the powers conferred in this title, provided it shall appear in the order filed by them that all the commissioners of highways of the town met and deliberated on the sub-

ject embraced in such order, or were notified to attend a meeting of the commissioners for the purpose of deliberating thereon,—unless it appears on the face of the order, not only that the third commissioner met with his associates, but that he participated in their deliberations, even if he did not concur in their conclusions; or, that he was notified, not only of the intended meeting, but of the particular subject on which it was proposed to deliberate. *Ib.*

7. The evident purpose of the provision was to secure to the parties whose rights might be affected by these summary proceedings a practical safeguard against unadvised and improvident action, and to establish a simple and uniform test of official authority in cases of this description. When the requirements of the statute are complied with, they raise a presumption of jurisdiction which can only be repelled by clear and affirmative proof that the recitals are false. When those requirements are disregarded, an order made by two of the commissioners has no legal validity or force. [28 N. Y., 297, 304; 30 Id., 470.] *Ib.*
8. Where an officer who holds an execution becomes satisfied that there was a want of jurisdiction in the court issuing the process, he is not bound to act under it, and if sued for a neglect of duty he may set up the invalidity of the process as a defense, even though he has already collected a portion of the amount specified therein, and made a return thereof. He has a right, under such circumstances, to suspend action at any time; and his return of a partial collection of the execution does not create an estoppel. *Supreme Ct.*, 1866, Tucker *v.* Malloy, 48 *Barb.*, 85.

ACKNOWLEDGMENT OF DEEDS; CAUSE OF ACTION, 16-19; CLAIM AND DELIVERY, 2; COSTS, 4, 10–13; CREDITOR'S ACTION, 2, 3; EXECUTION; INJUNCTION, 2–4.

PARTIES.

1. A party to an action, within the meaning of the Code, is one who is named plaintiff or defendant, and appears on the record as such. *N. Y. Superior Ct.*, 1863, Woods *v.* De Figaniere, 1 *Robertson*, 607.
2. *It seems*, that a number of persons may be joined as defendants in an action to restrain their acts, on the ground of nuisance, where their acts are of the same general character, and depend upon the same claim of right, notwithstanding the acts of each one are distinct from those of the others, and the complaint contains no charge of combination. Masterson *v.* Short, *Ante*, 154.
3. Although letters of administration, with the will annexed, granted in another State, will not enable the administrator to maintain an action in this State, upon any claim due the estate of such testator, yet an assignee thereof, from such administrator, for a valuable consideration, may do so. *N. Y. Superior Ct.*, 1863, Peterson *v.* Chemical Bank, 2 *Robertson*, 605.
4. A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association is assign-

able; and an action can be maintained by the assignee. *Supreme Ct.*, 1866, Grocers' National Bank of the City of New York *v.* Clark, 48 *Barb.*, 26; S. C. more fully, 32 *How. Pr.*, 160.

5. A right of action for a wrong committed against a banking association is assignable equally as if the property of an individual was thus misapplied or converted. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belouging to artificial persons. *Ib.*

6. In a creditor's suit against a judgment debtor to set aside a prior assignment made by him in trust for creditors, on the ground of fraud, the debtor is a necessary party. Indeed, he must be deemed the principal party; otherwise different persons, claiming portions of the assignee's property, could not be joined as defendants. The common point of litigation is the alleged fraudulent transfer of the property. *Ct. of Appeals*, 1866, Lawrence *v.* Bank of the Republic, 35 *N. Y.*, 320; reversing S. C., 3 *Robertson*, 142.

7. Where an action is commenced by some of the creditors of a debtor, on behalf of themselves and all others similarly situated who shall come in and contribute to the expenses of such action, no vested rights are acquired by any except those by whom the action is instituted, until after judgment. And the court has no power, by an order, to make other persons parties from the beginning, in order to preclude the defendants from satisfying the judgment which formed the foundation of such action. *N. Y. Superior Ct.*, 1863, Mattison *v.* Demarest, 1 *Robertson*, 717.

8. Money deposited by one as executor may be sued for and recovered by him in his own right. *Supreme Ct.*, 1866, Cheney *v.* Beals, 47 *Barb.*, 523.

9. In an action by one partner against his copartner for a dissolution of the partnership, it is proper to make a fraudulent vendee of the partnership property a party; as the sale may be adjudged fraudulent and void, and the vendee be compelled to account for it or its value. *N. Y. Superior Ct. Sp. T.*, 1864, Webb *v.* Helion, 3 *Robertson*, 625.

10. That trustees must all unite in bringing an action on behalf of the estate, —see Thatcher *v.* Candee, 33 *How. Pr.*, 145.

11. Where the complaint alleges that the plaintiffs were appointed trustees to receive subscriptions for the benefit of a public corporate institution, and claims to recover of the defendant, who signed a general subscription agreement, the amount of his subscription, the plaintiffs are trustees of an express trust, under section 113 of the Code, and are not liable for costs personally, on the dismissal of the complaint. *Supreme Ct.*, 1864, Slocum *v.* Barry, 34 *How. Pr.*, 320.

12. An order denying a motion to set aside an execution issued for costs against plaintiffs personally, in such a case, is appealable. *Ib.*

13. A private citizen, appearing in court in the capacity of tax-payer only, can not be heard in opposition to the confirmation of the report of commissioners of estimate and assessment appointed under the act of 1867, ch. 290, — providing for the improvement of a highway in Westchester

county. Whatever interest an individual has in the determination of such question arises from his liability, in common with others, to contribute a tax or assessment, and is not sufficient to confer on him a standing in court. Matter of the Southern Boulevard, *Ante*, 447.

CAUSE OF ACTION, 8; FORECLOSURE, 1.

PARTNERSHIP.

1. To constitute a general partnership, nothing more is necessary than that the parties should agree to conduct a specified business, and to share its profit and loss. The business may be of a general nature, or may be confined to particular transactions; but in either case the partnership is general. Eldridge *v.* Troost, *Ante*, 20.
2. A general partnership may exist in respect to a single venture, or may be made to extend over any number of adventures agreed upon by the parties. *Ib.*
3. Where parties agreed to carry on upon joint account the shipment of goods from Calcutta for sale in New York, providing in their agreement for the mode of payment, manner of sale, division of profits, and sharing of losses, but prescribing no limit to the duration of the business, or to the amount or number of shipments;—

   Held, 1. That the parties were general partners.

   2. That the agreement did not create a new and distinct partnership as to each shipment, so that a liability incurred for one shipment could not attach to another—although it provided that "profit and loss should be settled in New York upon the winding-up of each shipment." The terms of the agreement, and the course of business under it, constituted a general partnership between the parties, covering all the shipments made.

   3. That in the settlement of the partnership affairs, goods or assets of the firm, appertaining to the joint enterprise, whenever shipped, and whether in the hands of the partners themselves, or of their assignees in trust for creditors, must be applied to the payment of the joint debts. *Ib.*
4. A provision in articles of copartnership prescribing a definite period for its continuance, without any prohibition of an earlier dissolution, is sufficient to prevent either party from dissolving it at will. *N. Y. Superior Ct.*, 1863, Smith *v.* Mulock, 1 *Robertson*, 569.
5. The general rules which govern the action of courts of justice in decreeing dissolutions of co-partnership,—stated. Waterbury *v.* Merchants' Union Express Co., *Ante*, 163.

PLEADING.

1. A party is not concluded by a mistaken averment of the law in a pleading,—*e. g.*, an averment that a statement and confession of judgment are irregular and defective. The rule applicable to an averment of a fact has

no force as to a statement of the law as applied to a certain state of facts. As every man is presumed to know the law, a mistaken assumption of what the law is in a particular case cannot be assumed to have misled the opposite party. No estoppel *in pais* arises when the facts are equally known to both parties, and the mistake of the party claiming to have been misled is one of law. *Ct. of Appeals*, 1867, Union Bank *v.* Bush, 36 *N. Y.*, 631.

2. Dates are always flexible in a pleading, and variances in that respect between it and the proof may be disregarded. *N. Y. Superior Ct. Sp. T.*, 1864, Zorkowski *v.* Zorkowski, 3 *Robertson*, 613.
3. Leave to file a supplemental complaint does not establish the plaintiff's right to sue for the original cause of action. *N. Y. Superior Ct.*, 1863, Robbins *v.* Wells, 1 *Robertson*, 666.
4. A release, given after issue is joined in an action, can properly only be the subject of a supplemental answer, and not of an amendment of that originally put in. *N. Y. Superior Ct. Sp. T.*, 1865, Matthews *v.* Chicopee Manufg. Co., 3 *Robertson*, 711.

AMENDMENT; ANSWER; COMPLAINT; DEMURRER; REPLY.

PRESUMPTIONS.

EVIDENCE, 1, 2.

PROHIBITION (WRIT OF).

1. The court will not issue a writ of prohibition to restrain a magistrate from entertaining a summary proceeding to remove a tenant, merely because the tenant has a clear defense to the proceeding. People *ex rel.* Bean *v.* Russell, *Ante*, 232.
2. If the magistrate has jurisdiction of the proceeding, he must be allowed to hear and decide it. If he decides erroneously upon the merits, the remedy is by *certiorari*, or action for damages. *Ib.*
3. The presumption of law is, that a judicial officer will decide a question submitted to him, correctly. *Ib.*

QUESTIONS OF LAW AND FACT.

1. The question of fraudulent intent is a question of fact for the jury, and not one of law. *N. Y. Superior Ct.*, 1864, Topping *v.* Lynch, 2 *Robertson*, 484.
2. In an action to set aside a sale of goods, and an assignment by the vendor of promissory notes received therefor, as fraudulent, the solvency of the purchaser, and the fairness of the sale to him, or the credit given, if the

evidence is doubtful, are entirely questions of fact. *N. Y. Superior Ct.*, 1865, Loeschigk *v.* Peck, 3 *Robertson*, 700.

3. In an action for malicious prosecution, if the testimony on the trial is conflicting, the question whether there was probable cause should be submitted to the jury. *Supreme Ct.*, 1866, Miller *v.* Milligan, 48 *Barb.*, 30.

REFERENCE.

1. In an action to open stated accounts and for an accounting, it is premature to apply for a reference, until the question of the right to an accounting has been determined. Until then, it does not appear that any examination of the accounts will be required. Mitchell *v.* Stewart, *Ante*, 250.
2. In an action to foreclose a mortgage the defendants in their answer set up a counter-claim. The reply to such answer denied any counter-claim. The defendant moved for a reference to take an account before trial. The plaintiff opposed the motion by an affidavit setting up an account stated —which defendant rebutted by counter-affidavit.—*Held*, that as the fact of the settlement came within section 254 of the Code, it could be tried by referee. *N. Y. Superior Ct. Sp. T.*, 1864, Carr *v.* Wehrnan, 2 *Robertson*, 663.
3. A county court has jurisdiction, upon the written consent of the parties, to order a reference in a case brought before it by appeal from a justice's court, where there is an *issue of fact* joined. *Supreme Ct.*, 1865, Hyland *v.* Loomis, 48 *Barb.*, 126.
4. An action to recover the value of property lost to the plaintiff by the negligence of the defendants, is not founded upon contract, but upon a breach of duty, and is not referable. *N. Y. Superior Ct. Sp. T.*, 1865, Warner *v.* Western Transportation Co., 3 *Robertson*, 705.
5. Where evidence is offered before a referee, and objected to, the referee cannot receive the evidence and reserve to himself the power of retaining or rejecting it at the conclusion of the case, if the party objecting insists upon an immediate decision of its admissibility. *Supreme Ct.*, 1866, Peck *v.* Yorks, 47 *Barb.*, 131.
6. If a referee does not comply with the directions of the Code, and of Rule 32,—requiring him to state in his report the facts found by him, and the conclusions of law, separately,—the report may be set aside for irregularity; and if the facts found by him and stated in his report, do not warrant his conclusions of law, the judgment rendered by him, if the proper exceptions are taken, must be reversed. *Supreme Ct.*, 1867, Leffler *v.* Field, 33 *How. Pr.*, 385.
7. Where the parties to an action pending before a referee stipulate that he may take more time for making and filing his report than the sixty days prescribed by the statute, his report will not be set aside as made too late, because he exceeds the time mentioned in the stipulation. Thiesselin *v.* Rossett, *Ante*, 54.

8. When the parties have once waived, as by the provisions of the statute they are enabled to do, the right to exact a report within the sixty days, there is nothing in the statute which declares that the report may be set aside, or that any other particular consequence shall result from the failure of the referee to report within the extended time. If the parties surrender the right to require a report within sixty days, they can not, by any stipulation, control the action of the referee. *Ib.*
9. What constitutes an act indicating the intention of a party to disaffirm the right of a referee to deliver a report after the expiration of the time prescribed by law,—considered. *Ib.*

REMOVAL OF CAUSES.

1. One who maintains his domicil in another State, where his family reside, should be regarded as a citizen of that State, for the purpose of determining a question of removing a cause from a State to a Federal court, notwithstanding he carries on business in the State in the courts of which the action is brought, and visits that State regularly and frequently in the transaction of such business. Fish *v.* Chicago, &c. R. R. Co., *Ante*, 453.
2. This principle applied to special facts in several instances. *Ib.*
3. What inference, as to the fact of citizenship, should be drawn from such acts as voting, procuring one's name to be registered as a voter, paying an income tax, &c.,—considered. *Ib.*
4. The New York statutes (*Laws of* 1853, ch. 466, and *Laws of* 1855, ch. 279),—requiring corporations chartered by other States, and carrying on business in New York, to appoint an agent in New York to receive service of process against such corporations,—do not affect the question of citizenship of the corporation, arising on a motion to remove an action in which it is a party from a State to a Federal court; nor qualify the rights of parties in such an action in respect to such removal. Those acts provide a mode in which suits may be *commenced* in the State courts, against the corporations to which they relate; but do not prevent a corporation against which an action has been commenced from applying to have it *removed* to a Federal court. For the purposes of an application to remove a cause from a State to a Federal court, a corporation must be regarded as dwelling in the State by which it is created, notwithstanding any business it may carry on in another State; and an action by or against it must be regarded as prosecuted by or against citizens of such State. *Ib.*
5. The provisions of the act of Congress of Sept. 24, 1789,—relative to the removal of causes from State to Federal courts,—do not authorize a removal of an action brought against more than one defendant, if any defendant is a citizen of the State in which the action is brought. *Ib.*
6. In applying acts of Congress authorizing removal of a cause in which the "plaintiff" or "defendant" is a citizen, to a case in which several persons

are plaintiffs or defendants, it is requisite that all the plaintiffs or defendants should be citizens. *Ib.*

7. The construction of the acts of Congress of July 27, 1866 (14 Stat. at L., 306), and Mar. 2, 1867 (Id., 558),—relative to the removal of causes from State to Federal courts, and their application to the facts of a particular case,—determined. *Ib.*
8. Actions commenced in the supreme court by one foreign corporation against another can not be removed for trial into the circuit court of the United States, under the act of Congress of 1789. *Supreme Ct.*, 1866, Ayres *v.* Western R. R. Corporation, 48 *Barb.*, 132; S. C., 32 *How. Pr.*, 351.
9. But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this State, the action may be removed—provided the claim is of such a nature that the United States can take cognizance of it. *Ib.*
10. Notice must be given to a plaintiff if the defendant intends to move for the removal of an action from a State court to the United States circuit court, and prior to the service of the notice of application the defendant must make a formal appearance under section 12 of the United States judiciary act of 1798. *Supreme Ct.*, 1867, Bristol *v.* Chapman, 34 *How. Pr.*, 140.

REPLY.

A reply which denies averments in the answer, which are material to the pleading a proper counter-claim, can not be stricken out as frivolous. Wood *v.* Mayor, &c. of N. Y., *Ante*, 467.

SECURITY FOR COSTS.

1. A plaintiff who does not reside in the city of New York, though a resident of the State, may be required, on commencing a suit in the superior court of the city of New York to file security for costs. *N. Y. Superior Ct.*, 1864, Bolton *v.* Taylor, 3 *Robertson*, 647.
2. Where an order to file security for costs is peremptory and absolute, and no time is allowed for compliance therewith, Rule 57 is applicable, and the plaintiff has twenty days in which to comply with the order. An appeal from such an order does not, in itself, stay proceedings. And if the plaintiff does not file security within twenty days the defendant will be entitled to a dismissal of the complaint, unless a stay of proceedings is obtained. *N. Y. Superior Ct. Sp. T.* 1864, Freeman *v.* Young, 3 *Robertson*, 666.

SENTENCE.

Where a prisoner is found guilty of a simple assault, and is sentenced as for a felony, the sentence is unauthorized and void. The verdict being author-

ized, and substantially regular, the record must be returned to the court of sessions, with instructions to that court to proceed and pronounce judgment according to law. *Supreme Ct.*, 1867, Hussy *v.* People, 47 *Barb.*, 503.

SERVICE.

1. In cases of service by publication the computation of time is to be made excluding the first day and including the full period required for publication. Brod *v.* Heymann, *Ante*, 396.
2. The period required is six weeks—forty-two days. *Ib.*
3. Any judgment entered before that full period has elapsed, together with twenty days thereafter for answering, is premature and irregular, and should be set aside. *Ib.*

SET-OFF.

1. Judgments can not be set off against each other where one of them has been appealed from, and the appeal is still pending and undetermined. *N. Y. Superior Ct. Sp. T.*, 1864, De Figaniere *v.* Young, 2 *Robertson*, 670.
2. Where there are mutual demands between parties, which can not be set off under the statute, but which a court of equity may compensate or apply in satisfaction of each other, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of the equitable jurisdiction of courts of equity. But this has been done only when it did not interfere with the equitable rights of other creditors, or with other cherished principles of those courts. Equality is one of these principles; and, in cases of insolvency, equity, when not prevented by other rules of law or equity which are too stringent to be evaded, will countenance and aid an equal distribution of the assets; and will not, therefore, countenance a set-off which will give one creditor of an insolvent or a bankrupt an advantage over others equally vigilant. *Supreme Ct.*, 1866, Lane *v.* Bailey, 47 *Barb.*, 395.
3. Where securities are pledged by a debtor, to his creditor, as collateral security for a specific debt, the creditor, in an action against him for the conversion of the securities, can not set off his general demand against the plaintiff. *Ib.*
4. Although, on a mere motion to set off judgments, courts can protect their officers by refusing to set them off so as to defeat the attorney's lien for his costs, yet the statute respecting set-offs overrides the lien of an attorney. [9 Abb. Pr., 370 n.; Id., 14; 15 Id., 342.] *N. Y. Superior Ct. Sp. T.*, 1864, De Figaniere *v.* Young, 2 *Robertson*, 670.
5. The denial of a motion to set-off judgments is not a bar to an action to compel such set-off. *N. Y. Superior Ct.*, 1863, Pignolet *v.* Geer, 1 *Robertson*, 626.
6. At law set-offs are regulated and controlled by the statute, and both de-

mands must be liquidated by judgment before a set-off can be had. But as the statute does not control in equity, the demands need not be liquidated in order to be set off. *Ib.*

7. One who advances money to an agent or officer of the State not authorized to borrow money on the credit of the State, acquires no claim, legal or equitable, against the State for repayment, which can be the subject of set-off in an action brought by the State against him; even though the money was required and used by the agent or officer in the performance of his duty as such. People *v.* Brandreth, *Ante*, 224.
8. Whether, in any case, an individual sued by the State can interpose a set-off or counter-claim,—*query?* *Ib.*

SPECIAL PROCEEDINGS.

A power conferred upon a municipal corporation to institute proceedings in a court of justice to perfect its title to land required for a public street, avenue, &c., and to ascertain the just compensation to be made for the land so taken, is a remedy given to that corporation for that purpose; and not being an action, is necessarily a "special proceeding," within sections 1 and 2 of the Code of Procedure. *Ct. of Appeals*, 1867, King *v.* Mayor, &c. of N. Y., 36 *N. Y.*, 182.

SPECIFIC PERFORMANCE.

1. The rule of courts of equity that in some cases time may be regarded as not of the essence of a contract, does not extend so far as to enable a party in default to obtain affirmative relief in equity, in a case where he shows neither any good reason for non-performance by the day named in the contract, nor any peculiar equity. Chase *v.* Hogan, *Ante*, 57.
2. The general rule applicable in this class of cases is, that time is a circumstance of decisive importance, but that it may be waived by the conduct of the parties; and that it is incumbent on a plaintiff who sues for a specific performance, either to show that he has used due diligence to perform the contract, on his part by the day named, or, if not, that his negligence arose from some just cause, or has been acquiesced in. *Ib.*
3. In an action for the specific performance of a contract for the sale of land, it appeared that the plaintiff agreed with the defendant's testator for the purchase from him of the lot of land in question, upon which the vendor was to make the purchaser a building loan. The agreement provided that if the plaintiff should refuse or neglect to complete the building contracted for, or if the diligent prosecution of the work thereon should at any time be suspended for ten days, the vendor should have the right to insist on immediate repayment of his advances, and to sell, on ten days' notice to the purchaser, all the purchaser's interest in the premises, and to apply the

proceeds, &c. Upon the completion of the building the vendor was to give the purchaser a deed of the lot, and the purchaser was to give back a mortgage for the price of the lot and the building loan. It further appeared that before the building was completed the purchaser suspended all work upon it, in consequence of which the vendor gave him notice that he would sell the interest of the purchaser in the contract under the power reserved, unless his advances were repaid; and a sale was accordingly made at public auction, no notice of time or place of sale being given to the purchaser, and the vendor buying in the property. In an action by the purchaser against the executors of the vendor, to compel a performance of the contract of sale and the delivery of the deed:—

Held, 1. That the evidence adduced to show a reason for the purchaser's delay in completing the building was insufficient for that purpose, and the purchaser was therefore not entitled to a specific performance, upon the ground that his own non-performance on the day was excused.

2. That the mere fact that if plaintiff was not relieved he would suffer a loss of time and materials did not constitute a special equity such as would entitle him to relief within the rule above stated. *Ib.*

4. The provisions in the contract authorizing the vendor to resell for repayment of his advances were not obligatory upon him. It was optional with him to resort to a resale or to wait until the time limited for performance expired, and then, in case of non-performance, treat the contract as at an end, and resume possession of the property, disclaiming the right to resell. *Ib.*

5. The provisions of the contract reviewed with reference to this question; and their construction determined. *Ib.*

6. Whenever a court of equity declines, by reason of a default on the part of the plaintiff, to decree a specific performance of a contract in his favor, it will also decline to award him damages for the breach. *Ib.*

7. That an action to compel the specific performance of an *ambiguous* covenant will not be entertained, — see Buckmaster *v.* Thompson, 36 *N. Y.*, 558.

COMPLAINT, 5.

STAMPS.

That a receipt given by an express company, for goods delivered to it for carriage, does not require a United States revenue stamp to be affixed to it,—see Belger *v.* Dinsmore, 34 *How. Pr.*, 421.

EVIDENCE, 15; JUSTICE'S COURT, 1.

STATUTES.

1. The distinction between public and private statutes,—stated. Bretz *v.* Mayor, &c. of N. Y., *Ante*, 478.

2. An act enabling the local authorities of a particular city or county to raise money by tax for the payment of certain claims against it, is not a public but a private act; and the courts can not take notice of it, unless it is pleaded. *Ib.*
3. That when a public statute is remedial in its nature it should be construed liberally with a view to the beneficial ends proposed,—see Hudler *v.* Golden, 36 *N. Y.*, 446.

STAY OF PROCEEDINGS.

A stay of proceedings to enable a party to move for a special jury should not be granted, except at the trial term, or by the justice assigned to hold that part of the trial term upon whose calendar the cause is placed. [Rule 39; Code, § 402.] If a stay be granted by a different justice, it may be vacated on application of the defendant. [Code, § 324.] *N. Y. Superior Ct. Sp. T.*, 1864, Walsh *v.* Sun Mutual Ins. Co., 2 *Robertson*, 646.

STIPULATIONS.

When an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney, or as matter of proof on the hearing, it cannot be retracted on a subsequent trial, unless by leave of the court. *Ct. of Appeals*, 1867, Owen *v.* Cawley, 36 *N. Y.*, 600.

SUMMARY PROCEEDINGS.

1. The affidavit by which summary proceedings for the removal of a tenant are initiated need not state the date or duration of the lease. *Supreme Ct.*, 1867, People *ex rel.* Teed *v.* Teed, 48 *Barb.*, 424; S. C., 33 *How. Pr.*, 238.
2. Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord, and the payment of rent to him by the tenant, establishes both of these issues against the tenant. *Ib.*
3. The statute requiring that upon summary proceedings an officer shall be sworn to keep the jury, &c., is directory in that respect; and though the return does not show that an officer was sworn, the court can not infer that the jury were not kept by officer, or that he was not sworn. It being the duty of the magistrate to swear an officer, the intendment of the law, in the absence of proof to the contrary, is that he performed his duty. *Ib.*

SUMMONS.

It seems, that in an action for unliquidated damages, although arising upon contract, the summons should be for relief, and not for a sum certain. Garrison *v.* Carr, *Ante*, 266.

SUPPLEMENTARY PROCEEDINGS.

1. In an action by a receiver appointed in supplementary proceedings instituted upon a judgment recovered in the common pleas, the complaint did not state that a transcript of the judgment had been docketed in the office of the county clerk. The defendant, however, without interposing a demurrer, went to trial upon the merits, and the proof then showed that the judgment debtor owned no real property.

   Held, 1. That it was not necessary that the affidavit to obtain an order for examination should show that a transcript had been filed in the office of the county clerk.

   2. That the defect, it were one, might be remedied by amendment. Kennedy *v.* Thorp, *Ante*, 131.

2. The cases arising upon judgments obtained in the district courts of the city of New York,—distinguished. *Ib.*

3. The proper method of obtaining the attendance of a witness before a county judge, upon a hearing in supplementary proceedings, is by a subpœna issued out of the court in which the judgment is obtained; and disobedience to such subpœna should be tried and punished by that court. People *ex rel.* Brunett *v.* Dutcher, *Ante*, 152.

4. Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession, or in the possession of another party, which are conceded to belong to the defendant. The judge has no power to try the question of title, where the property is in the hands of others who make claim to it. *Supreme Ct.*, 1865, Crounse *v.* Whipple, 34 *How. Pr.*, 333.

SURROGATES' COURTS.

1. Surrogates "shall have power and jurisdiction to compel testamentary trustees and guardians to render accounts of their proceedings in the same manner as executors, administrators and guardians appointed by such surrogates are now required to account." 2 *Laws of* 1867, 1926, ch. 782, § 1.

2. "Any decree or order of a surrogate for the payment of money may be discharged by filing with him a release of the amount, executed by the person to whom such money is directed to be paid, and acknowledged or proven, as is now required as to a conveyance of real estate; and such surrogate, on filing such release, shall indorse such discharge on the margin of the record of such decree or order; and on filing with the clerk of any county, where such decree or order has been docketed, a certificate from the surrogate of such discharge, the said clerk shall thereupon enter in his docket the fact of such discharge." *Id.*, § 9.

3. Supervisors of each county to provide surrogate's court with rooms, fuel, lights and stationery, and if they neglect so to do, the court may direct sheriff so to do; the expense to be a county charge. *Id.*, § 10.

4. "When a widow shall die, leaving her surviving a minor child or children, the same articles and personal property shall be set apart by the ap-

praisers for the benefit of such minor or minors, and as is now provided by law in the case of a man dying and leaving a widow or minor children; and all articles and property set apart, in accordance with law for the benefit of a widow and minor or minors, shall be and remain the sole personal property of such widow after such minor or minors shall have arrived at age." *Id.*, § 13.

5. Surrogate may commit witness who appears to have sworn falsely. 2 *Rev. Stat.*, 568, 681, § 5, as amended 2 *Laws of* 1867, 1930, ch. 782, § 15.
6. "From and after the passage of this act, no surrogate shall charge or receive any fee or compensation for any official services performed by him." 2 *Laws of* 1867, 1930, ch. 782, § 16.

EXECUTORS AND ADMINISTRATORS.

TIME.

1. In cases of service by publication the computation of time is to be made excluding the first day, and including the full period required for publication. Brod *v.* Heymann, *Ante*, 396.
2. The period required is six weeks—forty-two days. *Ib.*

SPECIFIC PERFORMANCE, 1–5.

TRADEMARKS.

1. The court will not enjoin a defendant from using his own name in the prosecution of a manufacturing business, because it is similar to that of a rival manufacturer in the same business. Any injury which one manufacturer may suffer by competition of other persons of the same name, from the use of such name merely, is without remedy under the law of trademarks. Faber *v.* Faber, *Ante*, 115.
2. What mode of putting up and selling pencils, singly or in quantities, will be deemed an imitation of the method of a prior manufacturer, and a violation of his trademark,—considered. *Ib.*

INJUNCTION, 6.

TRIAL.

1. A cause of action for damages for injuries to real property by the negligence of the defendant is necessarily local, and must be tried in the State where the real property is situated. *N. Y. Superior Ct.*, 1863, Mott *v.* Coddington, 1 *Robertson*, 267.
2. A cause of action for breach of a covenant to convey real property is transitory; and the courts, having obtained jurisdiction of the parties, can entertain jurisdiction of the action. *Ib.*
3. The former practice of moving for judgment as in case of nonsuit, for not

bringing the cause to trial, on showing that later issues upon the calendar had been tried, is still continued under the Code, by Rule 27. But this practice applies only to such causes as may be noticed and placed upon the calendar for trial at the circuit. It is entirely unadapted to causes that have been *referred*. *Supreme Ct.*, 1867, Kimberly *v.* Parker, 34 *How. Pr.*, 275.

4. A motion for judgment as in case of nonsuit can not be made by a single defendant under section 274 of the Code, as that section provides only for those cases where there are several defendants, and the plaintiff has unreasonably neglected to serve the summons on some or one of them, or to proceed in the cause against the defendant or defendants who may have been served. *Ib.*

5. Whether a cause is of legal or equitable cognizance,—whether it was tried before a judge and jury, or before the court alone, a party may entitle himself to a review of a decision denying his motion to postpone for the absence of a material witness, in either one of these modes:

1. On the denial of his motion he may withdraw from the trial; and if it proceeds, and the cause is decided against him, he may, upon affidavits showing the application to postpone, the papers upon which it was founded, its denial, and that a decision has been made against him, make a non-enumerated motion at special term to set aside such decision.

2. Or he may remain and try the cause on the merits; and, in case of a decision against him, he may then either pursue the course above stated to obtain a new trial, or, if the trial was by jury, he may move at special term, upon a case, for a new trial, alleging as one of the grounds of error, the refusal to postpone; or, if the trial was by the court, he may appeal direct to the general term, alleging the refusal to postpone as cause for reversal. Howard *v.* Freeman, *Ante*, 292.

6. The former practice of the court of chancery, in respect to granting extensions of time in which to take the testimony of witnesses,—stated. *Ib.*

7. Under the union of legal and equitable forms of action, which has been introduced by the Code of Procedure, the grounds upon which a party may claim a postponement of a trial for the absence of a material witness, are the same in actions for equitable relief, as in those for relief of a legal character. In both classes of cases, a party has the right, when a cause is called for trial, to move for a postponement; and, as a concomitant to this right, he is further entitled to a review of a decision denying his motion. *Ib.*

8. Section 2 of article 2 of the constitution of 1846 provides that the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. At the time of the adoption of the constitution, all cases at common law were tried by jury. It follows that any party has the right to have any such action so tried at the present

time, and that he cannot be deprived of this right, if defendant, by the plaintiff including in his complaint a statement of facts arising out of the same transaction, showing a right of recovery in equity. Suits in equity were never tried by jury, unless an issue was ordered by the court for the trial of some specific fact. Under the Code it is clear that the facts entitling the party to both kinds of relief may be included in the same complaint, and both attained in the same action, when arising out of the same transaction. The right founded upon the common law must be tried by jury; and it would seem to follow necessarily that the entire cause must be so tried, as no provision is made for two trials of the issues joined in the same action. It would follow that when a plaintiff moves the trial of a cause at special term, and the defendant demands that it be tried by jury, the judge must determine whether any of the grounds upon which a recovery was sought were such as at the adoption of the constitution were redressed solely by an action at law, and if so, he should direct the cause to be tried by jury at a circuit, or at all events should refuse to try the cause without a jury. *Ct. of Appeals*, 1867, Davis *v.* Morris, 36 *N. Y.*, 569.

9. But should the judge decide erroneously in this respect, and proceed to try a cause without, which should be tried by jury, on motion of the plaintiff, it would not operate as a waiver of any of the legal rights of the plaintiff; and should the plaintiff fail to show himself entitled to any equitable relief, but should show a right to legal relief, the judge should not dismiss the complaint, but still order the cause to be tried by jury, as an action at law. *Ib.*

10. A trial by the court without a jury can not properly be had before several judges in succession, so as, after being decided in part by one, to be taken up at a subsequent term and completed by another justice. A cause can not thus be tried and determined by piecemeal. *N. Y. Superior Ct. Sp. T.*, 1865, Belmont *v.* Ponvert, 3 *Robertson*, 693.

11. When, under section 265 of the Code, the judge trying the cause at the trial directs exceptions to be heard in the first instance at the general term, and the judgment to be in the mean time suspended, judgment can only be given there. The power of the judge who tried the cause, over the disposition of the exceptions and judgment, is limited to the time of the trial. After that, he has no more power to make an order in the action, as to the hearing thereof, than any other judge. *N. Y. Superior Ct.*, 1865, Devoe *v.* Hackley, 3 *Robertson*, 679.

12. No judge of the court has authority, at any other time than at the trial, by an order, to prevent a cause from being argued at special term, which is required by law to be first argued there, and to send it to the general term for a first hearing. The general term, in such case, can not render a judgment either of affirmance or reversal; and it can not render an original judgment, as no authority was given to it so to do, on the trial. *Ib.*

13. That a waiver by a defendant of a prayer in his answer for affirmative relief, can not change the issue joined by the pleadings, nor affect any rights which the plaintiff would otherwise have in respect to the trial of such issue,—see Sutherland *v.* Rose, 47 *Barb.*, 144.

14. It is competent for the presiding judge to try a challenge to the favor, upon consent of parties; and where he does try it, without objection or request to submit the challenge to triers being made at the time, it will be implied that he did so by consent. O'Brien *v.* People, *Ante*, 368.
15. A witness having testified to facts material to the issue, the plaintiff gave evidence tending to show that the witness had made statements out of court, inconsistent with his evidence given on the trial. This testimony was objected to by the defendant, as immaterial and irrelevant; no other ground being stated for the objection.—*Held*, that the defendant could not afterwards urge the objection on the ground that the witness's attention was not directed to the time and place of the declarations and the person to whom they were made. *Supreme Ct.*, 1867, McDonald *v.* North, 47 *Barb.*, 530.
16. A judge at a trial is not bound, without the request of parties, to give any instructions to the jury. The latter are presumed to be acquainted with all the rules of law, in regard to which the parties do not require them to be instructed, or the court does not instruct them. *N. Y. Superior Ct.*, 1863, Haupt *v.* Pohlman, 1 *Robertson*, 121.
17. It is sufficient that the charge of a judge is in substantial accordance with the request, though he declines to adopt the particular language proposed. *Ct. of Appeals*, 1867, Fay *v.* O'Neill, 36 *N. Y.*, 11.
18. An erroneous assumption by a judge, in charging the jury, that there is no controversy upon a particular matter of fact, is to be corrected, not by taking an exception, but by calling his attention to the error, that he may at the time correct it. *N. Y. Superior Ct.*, 1863, Hoffman *v.* Ætna Fire Ins. Co., 1 *Robertson*, 501.
19. It is erroneous for a judge to charge that the circumstances proved show a change of possession, and a continued change of possession; or that the payment of money to an alleged purchaser on account of the proceeds of sales of goods, is *sufficient evidence* that the property was in possession of such purchaser. Such a charge is taking questions of fact from the jury. *N. Y. Superior Ct.*, 1864, Topping *v.* Lynch, 2 *Robertson*, 484.
20. It is not error for the judge to refuse to discharge the jury until they have agreed upon their verdict. Whether or not to discharge them, is a question addressed to his discretion. *Ct. of Appeals*, 1866, White *v.* Calder, 35 *N. Y.*, 183.
21. The rendering of a general verdict by a jury, and its reception by the court, without objection either by the judge or the parties, is good, notwithstanding the failure of such jury to find upon certain special questions of fact, upon which the court, in the charge, directed them to find. *N. Y. Superior Ct.*, 1863, Moss *v.* Priest, 1 *Robertson*, 632.
22. A party, by not objecting to the reception of such verdict, without written answers to the special questions, waives all right of objection to such verdict. *Ib.*
23. Where the jury, in an action for deceit in the sale of a horse, rendered a sealed verdict, by which they found that the horse sold to the plaintiff

was lame; that there was a warranty on the sale; and that the plaintiff was entitled to the sum of $95 as damages,—*Held*, that this was in substance a general verdict for the plaintiff, and was properly received and entered as such by the court. *Ib.*

24. General impressions, relative to the cause about to be tried, derived from reading statements in the newspapers, and not amounting to an opinion upon the guilt or innocence of the prisoner, do not disqualify a person from serving upon the jury. O'Brien *v.* People, *Ante*, 368.

25. A venireman summoned to try a capital cause, testified, upon challenge for principal cause, that he had conscientious scruples against finding a verdict in a case involving life and death; but explained that he was not opposed to capital punishment, but his scruples rested on other grounds. —*Held*, that he was disqualified. The grounds of his scruples were unimportant. It was enough that they existed. *Ib.*

26. Error in an answer given by the judge to a question put by a juror, on a criminal trial, will not affect the conviction, where the question had clearly no pertinency to the case made by the evidence, and no clearer or more particular instructions upon the subject of it, than those previously given by the judge in his charge, were, in any aspect of the case, necessary. *Ib.*

27. On the trial of an indictment for perjury, one of the associate justices had occasion to leave the bench for a few moments, to hand a paper to a person who was waiting in court to receive it, and while he was so doing, an objection to the admission of a deed was overruled.—*Held*, that this did not vitiate the proceedings. The court was properly constituted, and all its members were in actual attendance. The statute neither requires that the judges should be seated during the progress of a trial, nor that they should be polled on the decision of every question of law. The rulings as to the admission and rejection of evidence are ordinarily made and announced by the presiding judge, in the hearing of his associates, and with their presumed concurrence. The members of a judicial tribunal, from considerations of convenience, propriety and decorum, usually occupy the particular seats assigned to them; but when a session is progress, with a quorum in actual attendance, the casual and temporary absence of one of the judges from a seat thus assigned, neither breaks up the court nor impairs the validity of its proceedings. If the justice in the present instance, had desired to dissent from the ruling of the presiding judge, the announcement of that fact from the position in which he happened to be at the moment would have been just as effectual as if made from the seat on the bench which he had left a moment before, and to which he was then in the act of returning. *Ct. of Appeals*, 1867, Tuttle *v.* People, 36 *N. Y.*, 431, 440.

28. On a trial for murder, the indictment containing two counts—one for killing M., and one for killing S.,—the prisoner's counsel asked the court, at the outset, to require the district-attorney to elect upon which he would proceed. The court reserved its decision, and no objection thereto was

made. The evidence showed that the deceased was known by both the names used in the indictment. At the close of the evidence, the court required the district-attorney to elect;—he elected to proceed under the count for killing S.;—a *nolle prosequi* was then entered upon the other count;—the counsel for prisoner then moved to strike out all evidence referring to the party under the name of M.; the motion was granted, and the jury found a verdict of guilty.—*Held*, that no error was committed; and that, there being ample evidence of the killing S., after striking out all that related to M., the verdict must be sustained. O'Brien *v.* People, *Ante*, 368.

EXCEPTIONS; FORECLOSURE, 2; NEW TRIAL; REFERENCE.

UNDERTAKING.

When a plaintiff commences an action without filing an undertaking required by law as a condition precedent to suing, the court may (under section 174 of the Code of Procedure), allow it to be filed *nunc pro tunc*. Millbank *v.* Broadway Bank, *Ante*, 223.

CLAIM AND DELIVERY, 1.

VARIANCE.

That, where the complaint in an action to recover money paid by mistake, alleges a demand, and a refusal to pay back the money, and the defendant's answer admits the refusal to pay, proof of a promise by the defendant, afterwards, does not present such a variance between the cause of action alleged and the evidence as will preclude a recovery,—see Rosboro *v.* Peck, 48 *Barb.*, 92.

WITNESS.

1. A witness who stated that he had been in business for many years as a manufacturer of saws, and blacksmith, and that he was familiar with the material and quality of saws,—*Held*, presumptively competent to give an opinion of the weight of saws in question, and the value of their material. Hoe *v.* Sanborn, *Ante*, 189.
2. Who are competent to testify to value of land,—see Robertson *v.* Knapp, 35 *N. Y.*, 91.
3. A witness not a professional expert is not competent to express a general opinion upon the question whether an individual was sane or insane; though when examined as to what he himself witnessed in regard to such individual, he may state the impression produced on his mind by what he observed. O'Brien *v.* People, *Ante*, 368.
4. After a medical witness, in an action for breach of warranty on the sale

of a horse, has stated that he has read various standard authors on the subject of disease, and has given his own opinion in respect to the character of the disease of which the animal died, it is not an improper form of question to ask the witness—"What is the best opinion, according to the best medical authority?" *Supreme Ct.*, 1866, Pierson *v.* Hoag, 47 *Barb.*, 243.

5. The opinion of a witness in regard to handwriting is necessarily that of an expert; and it must appear that the judgment of the witness is founded upon knowledge of the handwriting of the person in question, and not upon inferences from extraneous facts. *N. Y. Superior Ct.*, 1863, Magie *v.* Osborn, 1 *Robertson*, 689.
6. Mere opportunity of seeing a person write and an acquaintance with the character of his handwriting does not render a witness competent to express his belief, founded upon other facts, as to the genuineness of the handwriting. *Ib.*
7. Where a corporation is defendant, the plaintiff cannot have an order for the examination of the defendant, as a witness, by its president and secretary. They are not "parties" within the meaning of sections 390 and 391 of the Code. *Supreme Ct.*, 1867, Goodyear *v.* Phœnix Rubber Co., 48 *Barb.*, 522.
8. The amendment of section 399 of the Code,—making it applicable to surrogates' courts and proceedings therein,—not only applied the provision allowing the examination of a married woman as a witness in her own behalf, but also the restriction on such examination; so that if she comes within that restriction she cannot be examined in her own behalf, against administrators, to prove any transaction had with her deceased husband. *Supreme Ct.*, 1867, Angevine *v.* Angevine, 48 *Barb.*, 417.
9. In an action by a husband against his wife, for a divorce on the ground of adultery, the wife is not a competent witness in her own behalf. *Supreme Ct.*, 1866, Rivenburgh *v.* Rivenburgh, 47 *Barb.*, 419.
10. The object of the exception in section 399 of the Code,—excluding the evidence of a party as a witness in his own behalf against representatives of a deceased person, in respect to "transactions or communications had personally," by him, with the deceased,—was, to exclude a party from testifying to any occurrence wherein the deceased was or must have been an actor. It was not designed to exclude the testimony of a party to an occurrence at which the deceased need not have been present, or a fact which he need not have known. *N. Y. Superior Ct.*, 1864, Franklin *v.* Pinkney, 2 *Robertson*, 429.
11. The term "any other witness" in the section of the Code of Procedure which provides that a party may be examined as a witness in his own behalf or in behalf of any party in the same manner as any other witness, must be understood to mean, any other witness subject to the same disabilities, or standing in the same relations to the party or the subject-matter. It is not intended to remove existing disqualifications, or to make a

person competent, *because* he is a party, who would otherwise be incompetent. *Supreme Ct.*, 1866, Rivenburgh *v.* Rivenburgh, 47 *Barb.*, 419.

12. A party to an action, as well as any other witness, may be compelled to make an affidavit, under subdivision 7 of section 401 of the Code of Procedure. Fisk *v.* Chicago, &c. R. R. Co., *Ante*, 430.

13. A "fishing" examination is not allowable, under that section. An order for the examination can only be made upon proof that the affidavit of the witness is "necessary;" and to allege this, involves knowledge in advance of the facts to which the witness will testify. *Ib.*

14. The proper course, when an affidavit is desired, is, ordinarily, to draft an affidavit and submit it to the witness to be verified, before applying for an order. *Ib.*

15. But the objection that no affidavit has been prepared and submitted, may be waived; and it is waived, if, when asked to make affidavit, the witness does not require a draft to be submitted, but makes a general refusal to testify. *Ib.*

16. After a witness has refused to make affidavit, and an examination has been ordered, the court should not arrest it upon the gronnd that an affidavit has subsequently been tendered, unless it very clearly appears that such affidavit is full and frank. *Ib.*

17. No examination of books and papers is allowable, in the proceeding authorized by subdivision 7 of section 401 of the Code. *Ib.*

18. To prove that a witness has been indicted for perjury, the indictment, or a certified copy of it, must be produced. The witness cannot be asked if he has been so indicted, on his cross-examination. *Supreme Ct.*, 1866, Peck *v.* Yorks, 47 *Barb.*, 131.

AFFIDAVIT; DEPOSITIONS; DISCOVERY AND INSPECTION; EVIDENCE, 14; SUPPLEMENTARY PROCEEDINGS, 3; SURROGATE'S COURT, 5; TRIAL, 5–7, 15.

THE END.

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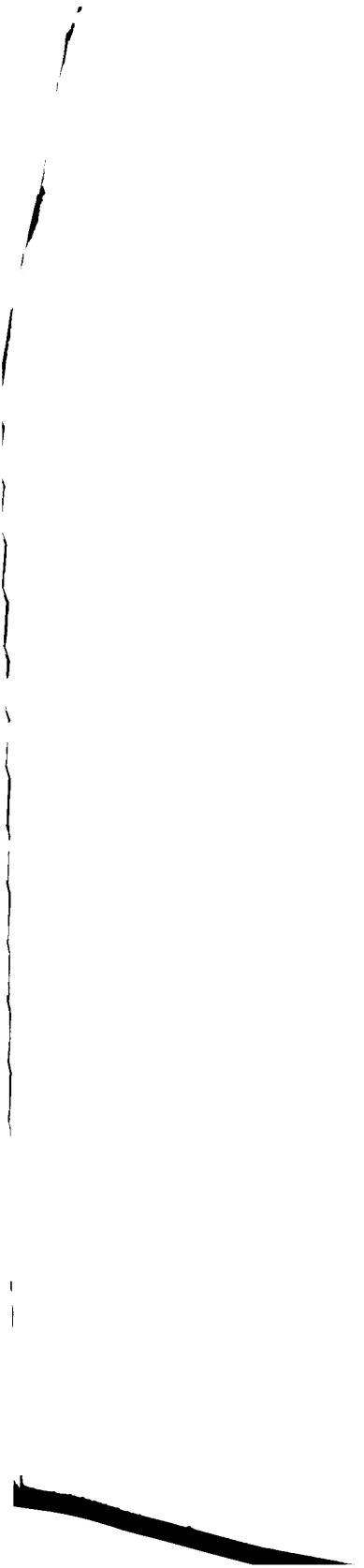
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